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No. (1) _____

In The
Supreme Court of the United States

THE VILLAGE OF MUNDELEIN, ILLINOIS,
Petitioner,

v.

WISCONSIN CENTRAL RAILROAD,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Federal Railroad Safety Authorization Act ("FRSAA"), 49 U.S.C. § 20106 (2007) preempts local governments from enacting laws related to *railroad safety* if the United States has issued regulations on the same subject matter. The questions presented are:

1. Whether local regulations prohibiting trains from blocking highway-grade crossings, through non-movement, relate to "railroad safety."

2. Whether federal regulations governing maximum train speeds, air brake testing, and grade crossing warning regulations "cover" the subject matter of local regulations which require trains to move through a grade crossing.

3. Whether the FRSAA's savings clause preserves the ability of local governments to require train operators to move trains through highway grade crossings within a specified time limit after stopping if it is within their reasonable control to do so.

RULE 29.6 STATEMENT

Petitioner, the Village of Mundelein, Illinois, is a local government entity not subject to Rule 29.6. The Village of Mundelein was the plaintiff-appellant below and is a municipal corporation incorporated under the laws of the State of Illinois. It has no parent corporation.

Respondent is the Wisconsin Central Railroad, whose parent company is Canadian National Railroad. Wisconsin Central Railroad was the defendant-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

The Petitioner respectfully petitions for a writ of certiorari to review the judgment and opinion of the Illinois Supreme Court decided on January 25, 2008.

OPINIONS BELOW

The opinion of the Illinois Supreme Court is reported at 227 Ill.2d 281, 882 N.E.2d 544, (Petition Appendix ("App.") 1a-24a). The Illinois Appellate Court for the Second District opinion is reported at 367 Ill.App.3d 417, 855 N.E.2d 230, (App. at 25a-50a). The trial court's decision is not reported but is contained in a transcript of the trial proceedings, the relevant portion of which is reproduced in the Appendix to this Petition. (App. at 51a-57a).

JURISDICTION

The judgment of the Circuit Court for the 19th Judicial Circuit, Lake County, Illinois, was entered on April 22, 2005. The Appellate Court of Illinois, Second District, entered judgment on September 6, 2006. The Supreme Court of Illinois entered a final judgment on January 25, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a).

Pursuant to Sup. Ct. Rule 14.1(e), the Petitioner states that 28 U.S.C. § 2403(b) may apply and a copy of this Petition has been served on the Attorney General for the State of Illinois.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Supremacy Clause of the United States Constitution provides in relevant part: [T]he laws of the United States "shall be the supreme Law of the Land; . . . any Thing in the Constitution or Laws of any state to the Contrary notwithstanding." U.S. CONST. art VI, cl. 2.

The relevant portion of the Federal Railroad Safety Authorization Act of 1994, 49 U.S.C. § 20101, *et seq.*,("FRSAA"), provides:

> Laws, regulations, and orders related to railroad safety . . . shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation or order related to railroad safety . . . until the Secretary of Transportation . . . prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety when the law, regulation, or order
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;
>
> (2) is not incompatible with a law, regulation, or order of the United States Government; and
>
> (3) does not unreasonably burden interstate commerce.

49 U.S.C. § 20106 (2007).

The Village of Mundelein ordinance at issue provides:

> Except insofar as the application thereof is clearly impractical or inappropriate, in view of the context or purposes thereof, all of the definitions, requirements, regulations, prohibitions, provisions and sections of the Illinois Motor Vehicle Code, as amended, (Illinois Revised Statutes, Chapter 95-1/2, Section 1-101 and 20-402, inclusive) are by reference adopted as ordinance definitions, requirements, regulations, prohibitions, provisions and sections of the village vehicle code. Any and all violations of Illinois Revised Statutes, Chapter 95-1/2, Sections 1-101 to 20-402, inclusive, as amended, shall be considered violations of this chapter and each such violation shall subject the violator thereof to the penalty provisions of this chapter; and the section numbers of the Illinois Motor Vehicle Code are adopted as section numbers of this code and may be cited as such.

Village of Mundelein, Illinois, Ord. 89-4-12 § 1(A) (1989).

The relevant portion of the Illinois Vehicle Code provides:

> (b) Obstruction of Highway at Grade Crossing Prohibited. It is unlawful for a rail carrier to permit any train, railroad car or engine to obstruct public travel at a railroad-highway grade crossing for a period in excess of 10

> minutes, except where such train or railroad car is continuously moving or cannot be moved by reason of circumstances over which the rail carrier has no reasonable control.

625 Ill. Comp. Stat. 5/18c-7402(1)(b)(West 2004) (recodifying Ill. Rev. Stat. Chapter 95 1/2).

The relevant portions of the Code of Federal Regulations, 49 C.F.R. 213.9(a) (2007) and 49 C.F.R. 232.211 (2007), and 49 C.F.R. 234.105, 234.106, & 234.107 (2007) are set out at App. 58a-63a.

STATEMENT OF THE CASE

This case presents important, recurring issues regarding the extent to which Congress preempted State and local governments' authority to regulate railroad conduct under the FRSAA. Specifically, this case presents the question of whether Congress intended to preempt local government authority to prohibit railroad operators from obstructing highway grade crossings for more than a specified amount of time when the operator has reasonable control over the obstruction. A highway grade crossing is an intersection of a railway and a public road at the same level. *See,* Federal Railroad and Highway Administrations, U.S. Dep't of Transportation, RAILROAD-HIGHWAY SAFETY PART II: RECOMMENDATIONS FOR SOLVING THE PROBLEM 2 (1972) (defining "public grade crossing").

Originally enacted in 1970 as the Federal Railroad Safety Act ("FRSA"), 45 U.S.C. § 421 *et seq.*, the FRSAA aimed to reduce railroad-related accidents and

deaths and to improve rail safety generally. *See*, *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 661-62 (1992). The FRSAA empowers the Secretary of Transportation, through the Federal Railroad Administration, to promulgate regulations to improve railroad safety. *Id.*

While the FRSAA contains an express preemption clause with respect to "railroad safety," two express savings clauses cabin the reach of the express preemption provision. The first of these clauses preserves state and local government authority to regulate on matters of railroad safety until the Secretary issues regulations which substantially subsume the same subject matter of state law. The second clause allows state and local governments to regulate even on those matters, provided the local regulation is not incompatible with the federal regulation, addresses a local safety hazard, and does not unduly burden interstate commerce. *See*, 49 U.S.C. § 20106.

A. Statement of the Facts Prior to and During Wisconsin Central's Obstruction of Hawley Street

On January 17, 2005, Wisconsin Central Railroad's train #A442 was scheduled to travel through the Village of Mundelein, Illinois, with Bernard Kareka acting as conductor of the train. Mr. Kareka and an engineer took over operation of train #A442 in Lake Villa, Illinois, after the train had been left there by the previous crew, en route from Fond du Lac, Wisconsin to Schiller Park, Illinois. App. at 2a.

The previous crew stopped train #A442 several hours before Mr. Kareka and the train's engineer arrived, leaving a note indicating the train had "bad air." App. at 2a-3a. A bad air notation is commonly understood to indicate the train had experienced a problem with the air brakes. After conducting required federal testing, Mr. Kareka and his engineer set off toward the Village of Mundelein and points beyond. Shortly after the train was underway a "hot box detector" alarm sounded, indicating the rear of the train was dragging equipment. App. at 3a-4a.

In response, the engineer began to slow down the train to a stop. Instead of responding normally to the engineer's braking, the train went into an emergency brake application situation. The emergency brake application was caused by a loss of air pressure, resulting in the sudden stopping of the train. App. at 4a.

Because the air pressure in the brake system did not return to its minimum required levels, Mr. Kareka conducted a visual inspection of the train. He noticed that the train had become separated about seventy-six cars back from the locomotives due to a broken draw bar between the cars. Mr. Kareka also noticed that there was an angle cock that was only partially open about six cars ahead of the break in the cars. App. at 4a.

Angle cocks act as valves to allow air to travel throughout the air brake system. When an angle cock is partially opened, less air travels to the rear of the train, causing the brakes to be applied sooner on the portion of the train forward of the partially open angle

cock than on the rearward portion. This uneven application of the brakes can cause the rear cars to run into the cars in the front. Mr. Kareka removed the train car with the broken draw bar, repaired an air hose rupture, and rejoined the remaining sections of train. App. at 4a-5a.

Significantly, at that time, the brake system displayed sufficient air pressure to allow the train to proceed south to Maple Street in Mundelein, where the rear car with the dragging rigging could be removed, or "set out," from the train. App. at 5a.

While the rear car was being set out the highway-grade crossings at Hawley Street and Park Street, both located in Mundelein, were blocked by train #A442.

While the rear car of train #A442 was being removed, a northbound suburban Chicago commuter (Metra) train arrived at the Mundelein train station. However, the Metra passengers could not get from the platform of the train station to the parking lot because the southbound Wisconsin Central #A442 train blocked the access to the parking lot from the platform. App. at 5a.

Mr. Kareka separated the Wisconsin Central train so the commuter passengers could get across the platform. After the commuter passengers had cleared the tracks Mr. Kareka rejoined the train and conducted federally required air brake testing. At that time, Mr. Kareka was unable to get sufficient air pressure in the brakes to allow the train as constituted to proceed to its final destination. App. at 5a.

While other train personnel tried to resolve the air pressure problem, a southbound Metra train stopped at the Mundelein commuter train station. Again, Mr. Kareka separated the train to allow the commuter passengers to cross the tracks to get to the parking lot. Because the problem with the air brake pressure could not be resolved, the dispatcher for Wisconsin Central Railroad ordered the front end of the train with sufficient air brake pressure to proceed south to Schiller Park, Illinois. App. at 6a.

At that point, train #A442 had obstructed Hawley Street for 157 minutes. App. at 6a.

In response to the two hour and thirty-seven minute obstruction of Hawley Street, the Village of Mundelein issued a $14,000 citation to Wisconsin Central Railroad for violating Village of Mundelein's ordinance adopting 625 Ill. Comp. Stat. 5/18c-7402(1)(b)((prohibiting the obstruction of a highway-grade crossing in excess of ten minutes). App. at 56a.

B. Statement of the Lower Court Proceedings

On April 22, 2005, Judge Raymond D. Collins conducted a bench trial with respect to whether Wisconsin Central Railroad violated the Village's ordinance. The parties stipulated that the Hawley Street grade crossing was blocked for 157 minutes.

Wisconsin Central Railroad solicited testimony designed to support its affirmative defense that the obstruction blockage was due to circumstances which were beyond its reasonable control. Wisconsin Central Railroad also argued that the Federal Railroad Safety

Act ("FRSA") preempted the Mundelein's grade crossing obstruction ordinance.

Judge Collins found the reasons for the grade crossing obstruction were within the reasonable control of Wisconsin Central Railroad. Judge Collins noted the conductor's decision to split train #A442 to prevent inconveniencing the Metra passengers in reaching their automobiles. The trial court further found that Mundelein's ordinance was not preempted by the FRSA on the facts of the case. Therefore, the trial court found the Wisconsin Central Railroad guilty of obstructing the grade crossing at Hawley Street for 157 minutes and imposed a fine of $14,000 plus court costs. App. at 51a-56a.

Wisconsin Central Railroad appealed, asserting that the FRSA preempted the ordinance and that the trial court's decision imposed additional duties on it that were preempted by FRSA. The Illinois Appellate Court agreed that federal law preempted the Village's ordinance and reversed. The Illinois Appellate Court ruled that the ordinance related to railroad safety, that the Federal Railroad Administration had issued regulations covering the subject matter of the Village ordinance, and that the ordinance did not meet the requirements of the FRSA's savings clause.

The Village of Mundelein then petitioned the Illinois Supreme Court to hear the case. That court granted the petition and upheld the Illinois Appellate Court decision, addressing only the federal preemption issue. App. at 8a, 24a. The Illinois Supreme Court also found that the Village's ordinance related to railroad safety because the state statute incorporated by the

Village's ordinance is titled Safety Requirements of Railroad Operations. The court determined that the plain language of the Village ordinance applied to railroad operations. On this basis, the court concluded the ordinance was related to "railroad safety." App. at 11a.

The court also determined the Secretary has issued regulations "covering" the subject matter of the Village's ordinance. First, the court held that the subject matter of the Village ordinance governed train movement. App. at 14a.

The court identified several of the Secretary's regulations and determined that a combination of three regulations resulted in the Secretary's having issued regulations governing the "movement of trains."

> These various regulations on train speed, air brake testing, and grade crossing safety work together to regulate and control the movement of trains at grade crossings. They control whether a train may be moved and the speed of a moving train. Taken together, the overall structure of these regulations substantially subsumes the subject matter of the movement of trains at grade crossings. We, therefore, find that the regulations manifest a clear intent to preempt the Village's ordinance on that subject matter.

App. at 17a.

The regulations used by the court to reach its conclusion that the Secretary has regulated "train

movement" are the regulation governing maximum speed limits on certain classes track, (49 C.F.R. 213.9a (2007)) the regulation governing air brake testing for trains in circumstances similar to those taking place in Mundelein(49 C.F.R. 232.211 (2007)), and several regulations governing grade crossing safety (49 C.F.R. 234.105, 234.106, & 234.107 (2007)). The court did not address the underlying facts or trial court's holdings. App. at 24a.

REASONS FOR GRANTING WRIT

Historically, the balance of authority in our dual federal-state system has been an issue of importance to this Court. Preemption should not be inferred from every Congressional enactment that overlaps state regulation. Instead, this Court assumes "that the historic police powers of the State [are] not to be superseded by [a federal statute] unless that was the clear and manifest purpose of Congress." *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, (1947). This Court's cases have established that state law is preempted under the Supremacy Clause, U.S. CONST. art. VI, cl. 2, in three circumstances. First, Congress can define explicitly the extent to which its enactments preempt state law. *See, e.g., Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 95-98 (1983), *Easterwood*, 507 U.S. 658. The FRSA contains an express preemption clause.

The second form of preemption recognized by this Court arises when a state regulates a field Congress intended the federal government to occupy exclusively. Congress's intent is inferred from a "scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the States to

supplement it," or where an Act of Congress "touch[es] a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *Rice*, 331 U.S. at 230. The FRSAA presents no issue of inferred, or implied, field preemption. The FRSAA's text makes clear that Congress expected state and local governments to regulate in those areas of railroad safety where the federal government had not yet regulated. Further, even in those areas, the text of the FRSAA's second savings clause shows that Congress anticipated state and local governments would regulate certain areas despite the existence of federal regulations on the same subject matter.

The third type of preemption recognized by this Court is conflict preemption, which is another form of inferred or implied preemption. Conflict preemption arises in two situations: Where it is impossible for a private party to comply with both state and federal requirements, *see, e.g., Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). *See also Maryland v. Louisiana*, 451 U.S. 725, 747 (1981). While, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), suggests that the existence of an express preemption clause forecloses implied preemption analysis, *Freightliner Corp. v. Myrick*, 514 U.S. 280, 287 (1995), held this was not a hard and fast rule. It is unclear whether implied conflict preemption applies under the FRSAA. In *Easterwood*, this Court rejected a challenge seeking to preempt state law tort claims based on an alleged

implied conflict with federal regulations issued under the FRSAA. *Easterwood*, 507 U.S. 658, 673, n. 12, (1993) ("We reject petitioner's claim of implied 'conflict' preemption . . . on the basis of the preceding analysis").

This case presents the question of how the presumption against federal preemption and the preemption principles outlined above apply to state health and safety regulation in the context of the express preemption provisions of the FRSAA. The presumption against preemption is especially strong with respect to state or local regulation of matters of health and safety. *See, Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 715 (1985). Further, "FRSA preemption is even more disfavored than preemption generally." *Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496, 515 (5th Cir. 1999) (internal citations omitted).

The Illinois Supreme Court's decision conflicts with this basic principle of FRSAA preemption. The decision is also in conflict with federal courts of appeal and other state courts with respect to the proper analysis to be engaged in when faced with a claim of FRSAA preemption. Because the question of the preemptive scope of the FRSAA with respect to regulating railroad carrier's blockage of public thoroughfares is of critical importance throughout the Nation, the Petitioners urge this Court to grant the Petition.

I. THE ILLINOIS SUPREME COURT'S DECISION CONFLICTS THIS COURT'S PREEMPTION TEACHINGS

The FRSAA preempts any State law, rule, regulation, order, or standard relating to railroad safety unless certain requirements are met. As this Court recognized in *Easterwood*, preemption under the FRSA is not easily achieved because Congress memorialized the general presumption against federal preemption in the very text of the two express savings clauses of the FRSA. These savings clauses surround the express preemption provision. *Easterwood*, 507 U.S. at 665, 668 (1993). The Illinois Supreme Court committed a series of errors resulting in its failure to give Mundelein's ordinance the deference this Court requires, bringing its decision squarely in conflict with this Court's federalism principles.

A. The Illinois Supreme Court Erred In Holding Mundelein's Ordinance Related to "Railroad Safety"

To prevail on the claim of preemption, a railroad first must establish that the state law at issue addresses "railroad safety," as that term is understood in the FRSAA. This Court has not addressed the definition of "railroad safety." Congress employed, but did not define, the term "railroad safety," in the FRSAA. In *Easterwood*, the Court examined whether a common law negligence tort for unsafe operation of a train was preempted by any of several federal regulations issued by the Secretary. This Court determined that the "legal duties imposed on railroads by the common law fall within" the broad phrase "law,

rule, regulation, order, or standard relating to railroad safety." *Easterwood*, 507 U.S. at 664. The *Easterwood* Court stated that to find preemption required finding evidence of Congress's preemptive purpose in the text and structure of the statute at issue. *Easterwood*, 507 U.S. at 664, citing *Shaw*, 463 U.S. at 95. The *Easterwood* Court impliedly recognized that the FRSAA only applies to state and local government laws designed to improve railroad safety. *Easterwood*, 507 U.S. at 665-75.

Without engaging in an in-depth analysis of the meaning of "railroad safety" as contained in the FRSAA, the Illinois Supreme Court opined that Mundelein's ordinance related to "railroad safety" because it affects railroad operations and included the term "safety" in the title. If the Illinois Supreme Court had followed this Court's admonishment to find evidence of Congress's preemptive purpose in the text and structure of the statute, it would have reviewed the FRSA with consideration for what "railroad safety" means in the context of the statute. Such a review should have lead to the conclusion that a State or local law requiring the movement of a train through a highway-grade crossing, and out of the public thoroughfare, is not an issue of "railroad safety" expressly preempted by the FRSAA. Preventing the obstruction of a grade crossing when it is within the reasonable control of the railroad operator is not implicated by Congress's desire to reduce railroad caused accidents, injuries, and deaths.

The FRSAA was designed to lessen direct loss of life or limbs or property damage caused by rail operations, not indirect injuries made worse by a rail

operator's blocking of a highway grade crossing. The Illinois Supreme Court erred when it found Mundelein's ordinance regulated "railroad safety" as that term is employed by the FRSAA.

B. The Illinois Supreme Court Failed to Analyze the Term "Cover" According to this Court's Holdings

Even if Mundelein's ordinance relates to "railroad safety," the FRSAA clearly contemplates that state legislation will not be preempted in two circumstances. The first of these occurs where the federal government has not adopted a regulation "covering the subject matter" of the state law. This provision reflects Congress's acknowledgment of a continuing role for the state regulation of railroad operations and railroad safety. The mere adoption of the FRSAA did not "instantaneously cover every safety hazard." *Missouri Pacific R. Co. v. Railroad Comm'n of Texas*, 833 F.2d 570, 573, n.3 (5th Cir. 1987) (citing See H.R.Rep. No. 1194, 91st Cong., 2d Sess., reprinted in 1970 U.S.CODE CONG. & AD.NEWS 4104, 4109).

For the Secretary's regulations to have a preemptive effect, railroad carriers must establish more than that the federal regulations 'touch upon' or 'relate to' the subject matter of a State or local law. The federal regulations must 'cover' the subject matter of the state law. *Easterwood*, 507 U.S. at 664, *see, also*, *Norfolk Southern Railway Co. v. Shanklin*, 529 U.S. 344, 352 (2000) ("for preemption to lie under the FRSA, both state and federal law must 'cover' the same subject matter"). "Cover" is a more restrictive term which indicates that preemption will occur only

if the federal regulations "substantially subsume" the subject matter of the relevant state law. The FRSAA displays considerable solicitude for state law because the express preemption provision is both prefaced and succeeded by express savings clauses. *Easterwood*, 507 U.S. at 664-65.

While the Illinois Supreme Court noted these teachings from *Easterwood*, it nonetheless found that regulations requiring air brake testing after certain events, regulating maximum speeds on certain classes of track, and governing trains with respect to grade crossing warning systems created a broad, comprehensive scheme regulating "train movement." The Illinois Supreme Court broadened the Secretary's regulations, interpreting them to cover train movement generally, rather than interpreting the regulations narrowly. This analysis of the federal regulations is contrary to this Court's holding that "general mandates" do not "cover the subject matter" of state laws. *Easterwood*, 507 U.S. at 668-69.

Under applicable Supreme Court precedent, the fact that federal regulations address specific aspects of train operations does not require preemption of local grade crossing obstruction regulations. The Illinois Supreme Court's decision and analysis failed to give Mundelein's ordinance the considerable solicitude it is due, leading to a decision that is contrary to this Court's teachings on this issue.

C. The Illinois Supreme Court Failed to Properly Analyze Whether Mundelein's Ordinance Is Incompatible with the FRSAA or Unreasonably Burdens Interstate Commerce

Mundelein's ordinance is neither incompatible with the FRSAA nor does it unreasonably burden interstate commerce. The Illinois Supreme Court hypothesized that to clear a grade-crossing within 10 minutes of stopping, a train operator might have to speed up beyond federal maximum speed limits. Therefore Mundelein's ordinance was incompatible with the federal regulations governing maximum speed. The court also hypothesized that to comply with federal air brake regulations, a train might have to block a grade crossing for more than 10 minutes. The court refused to conduct an individualized determination of whether in this case, the ordinance would result in any of the conflict imagined by the court.

However, this Court has long held that "the existence of a hypothetical or potential conflict is insufficient to warrant the preemption of the state statute." *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982), *see also*, *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) ("[a]lthough it is possible to envision circumstances under which price discriminations proscribed by the Robinson-Patman Act might be compelled by [the state statute], the existence of such potential conflicts is entirely too speculative in the present posture of this case" to warrant preemption," *citing Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 44, (1966). By hypothesizing situations in which Mundelein's ordinance might

require a railroad to take action in violation of a federal regulation, the Illinois Supreme Court sought out a speculative conflict that violates this Court's preemption teachings.

The court also hypothesized that a train operator could be required to adjust train length to clear the grade crossing within 10 minutes after stopping and that the ordinance therefore unreasonably burdened interstate commerce. The court relied on *Southern Pacific Co. v. Arizona*, 325 U.S. 761 (1945) for this proposition. In *Arizona*, this Court invalidated a state law that affirmatively required a change in train length. That situation is simply not presented by the facts of this case. Again, hypothetical situations should not be used to justify the preemption of state public health and safety laws.

II. THE ILLINOIS SUPREME COURT'S DECISION CONFLICTS WITH THE DECISIONS OF THE FEDERAL COURTS OF APPEAL AND OTHER STATE COURTS

The resolution of conflicts among the federal courts of appeals and the state courts of last resort on an issue of federal law is one of the primary justifications for this Court to grant certiorari. *See*, Sup. Ct. R. 10. There is a split among the lower courts with respect to the standard to employ under the FRSA, and this Court's intervention is needed to resolve this important and recurring question.

There are few decisions examining blocked grade crossing laws. The Illinois Supreme Court's decision is consistent with one federal court of appeals and two

state supreme courts in finding similar grade-crossing obstruction statutes preempted by federal regulations. *See, CSX Transportation, Inc., v. City of Plymouth*, 283 F.2d 812 (6th Cir. 2002); *Krentz v. Consolidated R. Corp.*, 910 A.2d 20 (Pa. 2006), *City of Seattle v. Burlington Northern R.R. Co.*, 41 P.2d 1169 (2002). The Illinois Supreme Court's opinion is in conflict with one state court of appeals decision, upholding a blocked crossing statute because no federal regulations addressed the specific subject matter of blocked crossings. *State v. Wheeling & Lake Erie Ry. Co.*, 743 N.E.2d 513 (2000).

However, when one considers the reasoning relied upon by the Illinois Supreme Court and the other courts that have invalidated blocked crossing statutes, a deeper split becomes evident. The analysis of the Illinois Supreme Court is in conflict with the analysis employed by the Fifth and Ninth Circuit Courts of Appeal. As mentioned above, the Illinois Supreme Court broadly interpreted federal regulations as governing "train movement." Both the Fifth and the Ninth Circuits have held that the FRSA preemption analysis requires *narrowly* construing federal regulations and engaging in specific analysis of federal regulations, not broadening the regulations to encompass general principles.

In *United Transportation Union v. Foster*, 205 F.3d 851, 860 (5th Cir. 2000), the Fifth Circuit stated that "when deciding whether the FRSA preempts state laws designed to improve railroad safety, we interpret the relevant federal regulations narrowly to ensure that the careful balance that Congress has struck between state and federal regulatory authority is not

improperly disrupted in favor of the federal government." The question in *Foster* was whether a Louisiana law requiring train operators use sound devices at specified locations was preempted by federal regulation governing sound equipment and whistle capacity. The Fifth Circuit found that the federal regulations did not "cover" the same subject as the state law. *Foster*, 205 at 862. *See also, Rushing v. Kansas City S. Ry. Co.*, 185 F.3d 496 (5th Cir. 1999).

In applying FRSA preemption, the Fifth Circuit "eschew[ed] broad categories such as 'railroad safety,' focusing instead on the *specific* subject matter contained in the federal regulation." *Foster*, 205 F.3d at 860 (*citing Easterwood*, 507 U.S. at 665-75); *see also, Rushing*, 185 F.3d at 515 (same). By giving the regulations at issue in this case broad effect, the Illinois Supreme Court's reasoning is in conflict with the holding of the Fifth Circuit eschewing broad categories.

Similarly, in *Southern Pacific Transp. Co. v. Public Utility Com'n of State of Or.*, 9 F.3d 807, (9th Cir. 1993), the Ninth Circuit Court of Appeals noted that this Court's FRSA teachings do not look broadly at categories such as "railroad safety," but rather look at the narrow categories such as "warning devices" when determining preemption. Applying that level of specificity in its analysis, the Ninth Circuit concluded that regulations promulgated under the FRSA did not preempt Oregon regulations restricting the use of whistles in certain circumstances. The "subject matter" of the federal regulations in that case was the sound-producing capacity of train whistles. By construing the subject matter of the federal regulations narrowly, the

court of appeals determined the capacity regulations did not "substantially subsume" the use of the whistles. As such, the federal regulations did not "cover" Oregon's regulations.

The Illinois Supreme Court's holding also conflicts with the holdings of the Supreme Court of Ohio, as detailed by *In re Miamisburg Train Derailment Litigation*, 626 N.E.2d 85, 93 (Ohio 1994), *cert. denied* by *Union Tank Car Co. v. Various Plaintiffs in Class*, 513 U.S. 809 (1994), where the court held that this Court's "substantially subsumes" language means that if a federal regulation does not "specifically address" the subject matter of the challenged state law, it does not "substantially subsume" and thus preempt it. The issue in that case was whether the plaintiffs could bring a negligence claim because train cars were not retrofitted with reinforcing pads between external attachments and the shell of the car. Federal regulations provided that train cars manufactured after a certain date must be outfitted with reinforcing pads, while earlier manufactured cars could continue in service. According to the Ohio Supreme Court:

> The mere general provision of Section 179.1(c), Title 49, C.F.R., that tanks mounted on or forming part of a tank car "built to specifications predating those in this part may continue in use" is not equivalent to an affirmative specific statement that the owner or operator of a tank car built prior to 1971 is under no duty to retrofit with reinforcing pads; and is also not equivalent to the further specific statement that one who does not retrofit a pre-1971 built tank car with reinforcing pads is

> shielded from liability under state tort law. Due to its lack of specificity, Section 179.1(c) does not "cove[r] the subject matter" of appellants' claims.

In re Miamisburg Train Derailment Litigation, 626 N.E.2d at 93.

The Ninth Circuit similarly has held that "[f]or purposes of § 434 of the FRSA, a state regulation 'covers the same subject matter' as an FRA regulation *if it addresses the same safety concerns* as the FRA regulation." *See*, *Burlington N. R.R. v. State of Montana*, 880 F.2d 1104, 1105 (9th Cir. 1989), *see also*, *106 Southern Pacific Transportation Co. v. Public Utilities Comm. of California*, 647 F. Supp. 1220, 1225 (N.D. Cal. 1986), *aff'd*, 820 F.2d 1111 (9th Cir. 1987) (per curiam); *State v. Wisconsin Cent. Transp. Corp.*, 546 N.W.2d 206, 211 (Wis. App. 1996).

The Illinois Supreme Court failed to properly consider a narrow interpretation of the federal regulations at issue, choosing instead to broadly review the scope of the regulations by finding the regulations govern "train movement." This shallow treatment of the question conflicts with the holdings of the Fifth and Ninth Circuit which require a narrow and specific inquiry in the preemption context.

Further, the Illinois Supreme Court opinion that the ordinance unreasonably burdens interstate commerce is in direct conflict the Massachusetts Supreme Court opinion in *Commonwealth v. New York Central Railroad Co.*, 216 N.E.2d 870, 873 (Mass. 1966), holding that a grade crossing ordinance did not

unreasonably burden interstate commerce. The court noted that "[s]hould this statute be struck down, trains might occupy crossings indefinitely leaving the highways in a continuing state of chaos."

The Illinois Supreme Court's preemption analysis is in conflict with other state supreme courts and with federal courts of appeal. This Court's intervention is required to resolve the conflict.

III. THE ISSUE OF THE PREEMPTION OF STATE AND LOCAL HIGHWAY-GRADE CROSSING PROHIBITIONS IS OF VITAL FEDERAL IMPORTANCE

Even aside from the clear conflict in the lower courts, this Court should grant certiorari because of the overarching importance of this preemption issue. If the Illinois Supreme Court is correct, and railroads cannot be forced to move their trains through grade crossings when it is within their reasonable control to do so, "the public would be unprotected indefinitely." *Id.* For example, if the Illinois Supreme Court's decision is correct and the federal regulations govern "train movement," thereby preempting all state and local statutes requiring grade-crossing obstructions be removed within a specified time period, train operators can stop on grade crossings for any whim – to have a smoke, talk on a cell phone, or simply admire the scenery. When it adopted the FRSA in response to growing concerns about threats to public safety, Congress did not intend to reduce public protection by creating regulatory voids, for "otherwise the public would be unprotected by either state or federal law."

Thiele v. Norfolk & Western Ry. Co., 68 F.3d 179, 184 (7th Cir. 1995).

Examining the sheer practical effect of blocked and obstructed grade crossing shows how important the federal preemptive scope of the FRSA and its regulations are. Between 241,000 and 260,000 public and private highway-rail grade crossings exist in the United States today. *See, Compilation of State Laws and Regulations on Matters Affecting Highway-Rail Crossings* at iv, Federal Railroad Administration ("FRA") (March 1999), available at *www.fra.dot.gov/downloads/Safety/cross_intro.pdf*, last visited April 15, 2008 and FRA Issue Brief, *Blocked Crossings*, available at *www.fra.dot.gov/us/content/907*, last visited April 15, 2008. Many of these crossings are in highly populated cities, towns, and suburbs, increasing the impact of grade-crossing obstructions. Throughout the country, citizens on the way to work or other obligations, businesses attempting to engage in commerce, and emergency services personnel engaged in life-saving work are affected by blocked grade crossings. Twenty-nine states in addition to Illinois have statutes governing the length of time a train may stop and block a grade crossing.[1]

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[1] Ariz. Rev. Stat. Ann. § 40-852; Del. Code Ann. Title 17, § 701; District of Columbia, 18 DCMR § 2211.7; Fla.. Stat. Ann. § 351.034; Idaho Code § 49-1425; Ind. Code Ann. § 8-6-7.5-1; Iowa Code § 327G.32; Kan. Stat. Ann. § 66-273; Ky. Rev. Stat. Ann. § 277.200; La. Rev. Stat. Ann. § 48:391; Mass. Ann. Laws ch. 160, § 151; Mich. Comp. Laws Ann. § 462.391; Minn. Stat. § 219.383 (3); Miss. Code Ann. § 77-9-235; Mont. Code Ann. § 69-14-626; N.H. Rev. Stat Ann. § 373:15; N.J. Rev. Stat. § 39:4-94; N.Y. [R.R.] Law § 53-c; N.D. Cent. Code, § 49-11-19; Ohio Rev. Code Ann.

The importance of addressing grade-crossing obstructions is recognized by the FRA, the administration charged with regulating railroad safety. The FRA recognizes that blocked crossings jeopardizes first responders ability react to emergencies, leads to citizens violating grade crossing prohibitions and adversely affects businesses and citizens by inhibiting their movement. The FRA has stated:

> The Federal Railroad Administration (FRA) is well aware of the safety hazards associated with blocked crossings. Blocked crossings can impede the movement of emergency response vehicles, be an inducement to crossing violations and trespassing, and adversely affect the quality of life in our communities. With the growth of rail traffic and continued railroad mergers concentrating that traffic on fewer lines, the problem will persist.

Blocked Crossings Issue Brief.

The FRA has further stated that while it aims to provide a safe environment for the movement of trains, its regulations do not regulate the amount of time a railroad can block a crossing:

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§ 5589.21; R.I. Gen. Laws § 39-8-4; S.C. Code Ann. § 57-7-240; S.D. Codified Laws Ann. § 49-16A-119; Tex. [Transp] Code Ann. § 471.007; Utah Code Ann. § 41-6a-1204; Vt. Stat. Ann. 5-68-358; Va. Code Ann. § 56-412.1; W. Va. Code § 31-2A-2; Wis. Stat. § 192.292.

> FRA's Role – FRA's regulations provide an environment for the safe movement of trains. They cover track, equipment, operating practices, signal systems, the transporting of hazardous materials, and the maintenance of automated warning devices (flashing lights and/or gates) at highway-rail crossings. The FRA, however, does not regulate the length of time a railroad may block a crossing.

Id. Under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944) and *United States v. Mead Corporation*, 533 U.S. 218 (2001), the FRA view of the scope of its regulations is entitled to deference.

The FRA also recognizes that "the issue of a State's authority to legislate or regulate blocked crossings is highly contentious and still being defined in the courts." *Impact of Blocked Highway/Rail Grade Crossings on Emergency Response Services* at 16, Federal Railroad Administration, (August 2006). Further, the Uniform Vehicle Code (UVC), a comprehensive guide designed to help States develop standard motor vehicle and traffic laws, trains should not block crossings for more than five minutes, except under special circumstances (*e.g.*, if a train is disabled; or if no vehicular traffic is waiting to use the crossing; or if it is necessary to comply with signals affecting the safe movement of trains). Highway-Rail Grade Crossing Model Law, National Committee on Uniforms Traffic Laws and Ordinances, *http://www.ncutlo.org/railgrade05.html,* last visited April 23, 2008. In light of the undefined nature of state and local governments' authority to minimize grade crossing obstructions, in light of the FRA's contention that it

does not regulate the length of time a train may block a highway grade crossing, and in light of the fact that the UVC advocates prohibiting obstructions of more than 5 minutes in length, this Court's intervention is need to bring certainty to this area of federal regulation.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF ILLINOIS

Docket No. 103543

[Filed January 25, 2008]

THE VILLAGE OF MUNDELEIN,
Appellant,

v.

WISCONSIN CENTRAL RAILROAD,
Appellee.

JUSTICE KILBRIDE delivered the judgment of the court, with opinion.

Chief Justice Thomas and Justices Freeman, Fitzgerald, Garman, Karmeier, and Burke concurred in the judgment and opinion.

OPINION

Defendant, Wisconsin Central Railroad (Wisconsin Central), was issued a citation for violating an ordinance enacted by plaintiff, the Village of Mundelein (Village), prohibiting obstruction of a railroad-highway grade crossing. Following a bench

trial, the trial court found Wisconsin Central guilty of violating the ordinance and imposed a fine of $14,000 plus costs. The appellate court reversed the trial court's judgment and vacated the fine, holding that the Village's ordinance is preempted by the Federal Railroad Safety Authorization Act of 1994 (FRSA) (49 U.S.C. §20101 *et seq.* (2000)). 367 Ill. App. 3d 417. For the reasons that follow, we agree that the Village's ordinance is preempted by the FRSA. Accordingly, we affirm the judgment of the appellate court.

I. BACKGROUND

The Village charged Wisconsin Central with violating its ordinance by allowing a train to block a railroad-highway grade crossing for 157 minutes. The Village's ordinance prohibits obstruction of public travel on a highway at a railroad crossing for more than 10 minutes, except when a train or railroad car is continuously moving or cannot be moved due to circumstances beyond the rail carrier's reasonable control. Prior to trial, Wisconsin Central filed a brief and offer of proof contending it did not violate the ordinance because the train was stopped due to circumstances beyond its reasonable control. Wisconsin Central also argued that the FRSA preempts enforcement of the ordinance.

At the bench trial, train conductor Bernard Kareka testified that he and the engineer assumed control of the train in Lake Villa, Illinois. The train had been left there by the previous crew on their way southbound from Wisconsin to Schiller Park, Illinois. Consisting of 3 locomotive engines and 119 cars, the train had stopped in Lake Villa for approximately three to four

hours. The previous crew departed and left a note stating that the train had "bad air," meaning there was a problem with the air brakes. The previous crew had repaired a couple of air leaks by changing the gaskets between the air hoses. Based upon the note, Kareka believed the previous crew had repaired any problem with the air brakes.

Kareka testified that he looked at several cars behind the locomotives to locate the hand brakes while the engineer inspected the locomotives. They released the hand brakes identified as being set in the previous crew's report. Kareka and the engineer then conducted a job briefing, reviewed reports from the previous crew, and ensured that any cars containing hazardous materials were placed in the proper location in the train.

Kareka further testified that federal regulations require verification that the air brakes are in working order before moving the train. The crew, therefore, conducted tests on the air brake system. The crew verified that the air pressure on the rear of the train was within 15 pounds of the pressure on the front as required by federal regulations. The engineer conducted a "set and release" test to verify that the brakes were in working order and there was sufficient air pressure throughout the brake system. Kareka testified that, as a crew taking over operation of a train already underway, they were not required to inspect the entire train or perform any tests beyond those they completed.

After completing the inspections and tests, the train left Lake Villa heading south toward the Village.

Upon approaching the Village, a "hot box detector" went off, indicating that equipment was dragging from the rear car of the train. The engineer began slowing the train when a sudden loss of air pressure caused the emergency brakes to apply on each car. The train suddenly stopped.

When the crew was unable to restore air pressure in the brake system on the rear of the train, Kareka got out to make a visual inspection. He noted that his footing was "very bad" and he had to hold onto the train cars to keep his balance due to the rough roadbed and the angle of the embankment. In walking the length of the train, Kareka discovered that an "angle cock" was misaligned on one of the cars. Kareka explained that an angle cock is a valve that regulates the air flow through the brake line in the cars. He asserted that the angle cock could have been knocked out of position by debris, vibration from the moving train, or sabotage. Kareka stated that when the engineer slowed the train to pass through the Village, the brakes on the front of the train would have set faster than those on the rear due to the angle cock's misalignment. This condition caused the rear portion of the train to collide with the front braking portion.

Kareka straightened the angle cock, continued the inspection, and discovered that the "drawbar" had broken and fallen off the rear of the seventy-sixth car, six cars behind the one with the misaligned angle cock. The train had separated and the emergency brakes applied due to the broken drawbar. The drawbar had fallen under the following car damaging the air hose.

After assessing the damage, the crew positioned the separated rear portion of the train to avoid obstructing any highway crossing. The crew proceeded south with the front part of the train and left the car with the broken drawbar on a spur track. The crew then reversed the train and returned to reconnect with the rear portion left on the track.

When they reached the rear portion of the train, the crew began the process of reconnecting it to the front portion. Kareka replaced the damaged air hose and reconnected the train. The crew then conducted brake tests, restored the air pressure to the required level, and moved the train to a location blocking Hawley Street in the Village, where they removed the rear car with the dragging equipment. The crew was then required by federal regulations to perform another air pressure test on the brake system. The crew was unable to restore the brake system air pressure to the required level on the rear of the train. Kareka reinspected the train, checking for leaks in the brake system. A crew from another train assisted Kareka in inspecting the brake system for leaks.

While the train continued to block the Hawley Street crossing, a Metra commuter train arrived at the Village station. The passengers from the Metra train could not get to their cars because Wisconsin Central's train was blocking access to the parking lot. The Wisconsin Central train was then separated to allow the passengers access to the parking lot. When the passengers cleared the tracks, the train was reconnected. However, the crew was still unable to restore the brake system air pressure in the rear portion of the train to the required level.

While Kareka and other employees tried to correct the problem, another Metra train arrived at the station. The crew again separated the train to allow Metra passengers access to the parking lot. At that point, a Wisconsin Central dispatcher directed the crew to take the front portion of the train to Schiller Park. The crew verified that the front portion of the train had adequate air pressure and proceeded south to Schiller Park. The rear portion was later attached to another train and brought to Schiller Park. The parties stipulated that the train blocked the Hawley Street crossing for 157 minutes.

After hearing closing arguments by the parties, the trial court asserted that if the crew had completed a visual inspection of the train before leaving Lake Villa "there may have not been a problem." A visual inspection may have revealed the misaligned angle cock and could have prevented the subsequent problems with the train in the Village. According to the court, a visual inspection of the train was within Wisconsin Central's reasonable control. Therefore, Wisconsin Central violated the ordinance because the circumstances resulting in obstruction of the Hawley Street crossing were within its reasonable control. The trial court further found that the Village's ordinance was not preempted by the FRSA. Accordingly, the trial court found Wisconsin Central guilty of violating the ordinance and imposed a fine of $14,000 plus costs.

On appeal, Wisconsin Central argued that enforcement of the Village's ordinance is preempted by the FRSA and by requiring a visual inspection of the train before leaving Lake Villa, the trial court imposed additional duties of inspection in an area of

law preempted by the FRSA. 367 Ill. App. 3d at 421. The appellate court held that the Village's ordinance is preempted. 367 Ill. App. 3d at 432. The appellate court, therefore, declined to address the trial court's application of the ordinance to the facts of this case. 367 Ill. App. 3d at 432. The appellate court reversed the trial court's judgment and vacated the fine. 367 Ill. App. 3d at 432.

We allowed the Village's petition for leave to appeal. 177 Ill. 2d R. 315(a). We then allowed the Illinois Municipal League to file an *amicus curiae* brief in support of the Village and the Association of American Railroads to file an *amicus curiae* brief in support of Wisconsin Central. 155 Ill. 2d R. 345.

II. ANALYSIS

On appeal to this court, the Village contends that: (1) its ordinance is not preempted by the FRSA; and (2) the trial court did not err in finding that Wisconsin Central violated the ordinance because the cause of the obstruction was within Wisconsin Central's reasonable control. The United States Supreme Court has stated that a preemption defense raises a threshold issue. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56, 154 L. Ed. 2d 466, 473, 123 S. Ct. 518, 522 (2002). The Court has, therefore, declined to address the merits or viability of underlying claims before considering preemption. *Sprietsma*, 537 U.S. at 56, 154 L. Ed. 2d at 473, 123 S. Ct. at 522. Likewise, when a preemption issue has been raised in this court, we have addressed it first before proceeding to the merits of the parties' specific claims. *See Kinkel v. Cingular Wireless, LLC*, 223 Ill. 2d 1, 15 (2006) (stating further analysis of the

enforceability of an arbitration clause would not be necessary if the plaintiff's claim were preempted by federal law). Accordingly, we will first address the parties' preemption arguments.

The supremacy clause of the United States Constitution provides that "[t]his Constitution, and the Laws of the United States *** shall be the supreme Law of the Land *** any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., art. VI, cl. 2. State law is preempted under the supremacy clause in three circumstances: (1) when the express language of a federal statute indicates an intent to preempt state law; (2) when the scope of a federal regulation is so pervasive that it implies an intent to occupy a field exclusively; and (3) when state law actually conflicts with federal law. *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 74, 110 S. Ct. 2270, 2275 (1990).

The determination of whether state law is preempted turns on the intent of Congress. *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 604, 115 L. Ed. 2d 532, 542, 111 S. Ct. 2476, 2481 (1991). When interpreting a federal statute pertaining to a subject traditionally governed by state law, courts are reluctant to find preemption unless Congress' preemptive intent is clear and manifest. *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 664, 123 L. Ed. 2d 387, 396, 113 S. Ct. 1732, 1737 (1993); *Mortier*, 501 U.S. at 605, 115 L. Ed. 2d at 543, 111 S. Ct. at 2482. Whether a federal statute preempts a state or local enactment presents a question of law subject to *de novo* review. *Kinkel*, 223 Ill. 2d at 15,

citing *Schultz v. Northeast Illinois Regional Commuter R.R. Corp.*, 201 Ill. 2d 260, 288 (2002).

Congress enacted the FRSA in 1970 "to promote safety in *every area of railroad operations* and reduce railroad-related accidents and incidents." (Emphasis added.) 49 U.S.C. §20101 (2000). The FRSA grants the Secretary of Transportation the authority to "prescribe regulations and issue orders for every area of railroad safety." 49 U.S.C. §20103(a) (2000). The FRSA explicitly directs the Secretary of Transportation to develop and implement solutions to safety problems at grade crossings. 49 U.S.C. §20134 (2000).

The preemptive effect of regulations issued by the Secretary of Transportation is governed by an express preemption clause in section 20106 of the FRSA (49 U.S.C. §20106 (2000)). When a statute contains an express preemption clause, we must construe that provision with a focus on its plain language that necessarily bears the best evidence of Congress' intent. *Sprietsma*, 537 U.S. at 62-63, 154 L. Ed. 2d at 477, 123 S. Ct. at 526, quoting *Easterwood*, 507 U.S. at 664, 123 L. Ed. 2d at 396, 113 S. Ct. at 1737. Section 20106 provides that:

> "Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to

railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order–

(1) is necessary to eliminate or reduce an essentially local safety or security hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce." 49 U.S.C. §20106 (2000 & Supp. 2004).

By its terms, section 20106 applies only to laws, regulations, or orders "related to" railroad safety or security. 49 U.S.C. §20106 (Supp. 2004). The phrase "relating to" has been given a broad meaning. *Easterwood*, 507 U.S. at 664, 123 L. Ed. 2d at 397, 113 S. Ct. at 1738, citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84, 119 L. Ed. 2d 157, 167-68, 112 S. Ct. 2031, 2037 (1992). The Supreme Court has interpreted that phrase to mean "having a connection with, or reference to," a certain subject matter. *Morales*, 504 U.S. at 384, 112 S. Ct. at 2037, 119 L. Ed. 2d at 167.

The Village has adopted by reference the blocked-crossing provision in the Illinois Vehicle Code (Code) (625 ILCS 5/1–100 *et seq.* (West 2004)). Mundelein Municipal Code §10.02.010 (1989). The ordinance at issue is set forth in section 18c–7402(1)(b) of the Code, providing that:

> "It is unlawful for a rail carrier to permit any train, railroad car or engine to obstruct public travel at a railroad-highway grade crossing for a period in excess of 10 minutes, except where such train or railroad car is continuously moving or cannot be moved by reason of circumstances over which the rail carrier has no reasonable control." 625 ILCS 5/18c–7402(1)(b) (West 2004).

The plain language of the ordinance applies exclusively to railroad operations, requiring rail carriers to prevent obstructions of highway grade crossings except in certain specified circumstances. Section 18c–7402 is entitled "Safety Requirements for Railroad Operations." 625 ILCS 5/18c–7402(1)(b) (West 2004). The section, therefore, refers to railroad safety requirements. A "connection with, or reference to," railroad safety is all that is required for application of section 20106. *See Morales*, 504 U.S. at 384, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037. The Village's ordinance has the required connection with or reference to railroad safety and, therefore, it falls within the scope of section 20106.

Having determined that section 20106 applies, we must consider whether the Secretary of Transportation has issued regulations or orders that preempt the Village's ordinance. Section 20106 dictates that to preempt state law, a federal regulation must "cover" the same subject matter, not merely "touch upon" or "relate to" that subject matter. *Norfolk Southern Ry. Co. v. Shanklin*, 529 U.S. 344, 352, 146 L. Ed. 2d 374, 382, 120 S. Ct. 1467, 1473 (2000), citing *Easterwood*, 507 U.S. at 664, 123 L. Ed. 2d at 397, 113 S. Ct. at

1738. The term "cover" is restrictive, indicating that preemption will be found only if federal regulations "substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664-65, 123 L. Ed. 2d at 397, 113 S. Ct. at 1738. The party advocating preemption has the burden of establishing the preemptive effect of regulations. *Easterwood*, 507 U.S. at 664-65, 123 L. Ed. 2d at 397, 113 S. Ct. at 1738.

The preemption issue here depends on whether regulations issued by the Secretary of Transportation substantially subsume the subject matter of the Village's ordinance. The Village asserts that the subject matter of its ordinance is the amount of time a standing train may obstruct a highway grade crossing. On the subject matter of a state law, the Seventh Circuit Court of Appeals has stated:

> "'The subject matter of the state requirement' is the safety concerns that the state law addresses. [Citation.] Generally, determining the safety concerns that a state or federal requirement is aimed at will necessarily involve some level of generalization that requires backing away somewhat from the specific provisions at issue. [Citation.] Otherwise a state law could be preempted only if there were an identical federal regulation, and, as we noted, *Easterwood* teaches that this is not so. *See* 507 U.S. at 674, 113 S. Ct. 1732 (preemption found through series of related regulations and overall structure of the regulations, although no regulation directly addressed the state requirement); *see also*

Burlington Northern R.R., 880 F.2d at 1106 (FRA regulation permitting telemetry device rather than visual inspection preempted state law requiring trains to have a caboose because both were aimed at the safety concern of monitoring brakes and signals at the rear of the train). But with too much generalizing– 'public safety' or 'rail safety'–our analysis would be meaningless because all FRA regulations cover those concerns." *Burlington Northern & Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999).

In a recent preemption case involving a blocked-crossing statute, the Pennsylvania Supreme Court rejected an argument similar to the one the Village advances on the subject matter of its ordinance. *See Krentz v. Consolidated R. Corp.*, 589 Pa. 576, 600-01, 910 A.2d 20, 35 (2006). The plaintiffs in *Krentz* argued that the Pennsylvania blocked-crossing statute was directed at limiting the amount of time a standing train may obstruct a highway crossing. *Krentz*, 589 Pa. at 600, 910 A.2d at 35. In determining the subject matter of the statute, the Pennsylvania Supreme Court focused on its location within the Pennsylvania statutes and its plain language. *Krentz*, 589 Pa. at 600-01, 910 A.2d at 35, citing *CSX Transportation, Inc. v. City of Plymouth*, 92 F. Supp. 2d 643, 651 (E.D. Mich. 2000), *aff'd*, 283 F.3d 812 (6th Cir. 2002). The court concluded that the codification and plain language of the blocked-crossing statute indicated that its subject matter was the regulation of the movement of trains. *Krentz*, 589 Pa. at 600-01, 910 A.2d at 35.

We agree that the codification and plain language of a statute are relevant in determining its subject matter. Here, the Village's ordinance is adopted by reference from section 18c–7402(1)(b) of the Illinois Vehicle Code. *See* 625 ILCS 5/18c–7402(1)(b) (West 2004). Although section 18c–7402(1)(b) is contained within the Code, it is more specifically located in subchapter 7 of the Illinois Commercial Transportation Law, entitled "Rail Carriers" (625 ILCS 5/18c–7101 *et seq.* (West 2004)). True to its name, each provision in that subchapter regulates railroads. Section 18c–7402(1)(b) is located in Article IV of subchapter 7. Article IV is entitled "Safety Requirements for Rail Carriers" (625 ILCS 5/18c–7401 *et seq.* (West 2004)). The specific title of section 18c–7402(1)(b) is "Safety Requirements for Railroad Operations" (625 ILCS 5/18c–7402 (West 2004)).

Most importantly, the plain language of the Village's ordinance applies only to rail carriers and prohibits them from allowing trains to obstruct public travel at highway grade crossings except in specified circumstances. The ordinance is aimed at keeping trains moving through highway grade crossings. As in *Krentz*, the plain language of the Village's ordinance is directed at regulating the movement of trains. Therefore, consistent with the context and plain language of the ordinance, we conclude that its subject matter is the movement of trains through grade crossings.

On this point, we note that the Village also argues the primary purpose of its ordinance is to allow police, fire, and ambulance services to be free from obstructions in responding to calls, while its secondary

purpose is to prevent traffic congestion. The Supreme Court, however, has refused to rely solely upon the professed purpose of a state law and has also examined its effect when determining its impact on a federal scheme. *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88, 105, 120 L. Ed. 2d 73, 89, 112 S. Ct. 2374, 2387 (1992). A state law may not frustrate the operation of federal law by claiming some purpose other than that specifically addressed by the federal law. Rather, the supremacy clause renders invalid any state legislation that frustrates the full effectiveness of federal law. *Gade*, 505 U.S. at 105-06, 120 L. Ed. 2d at 89, 112 S. Ct. at 2387, quoting *Perez v. Campbell*, 402 U.S. 637, 651-52, 29 L. Ed. 2d 233, 243-44, 91 S. Ct. 1704, 1712 (1971). Thus, "[i]t is the *effect* of the state law that matters in determining preemption, not its intent or purpose." (Emphasis in original.) *Teper v. Miller*, 82 F.3d 989, 995 (11th Cir. 1996). The effect of the ordinance, and its subject matter, is to regulate the movement of trains at highway grade crossings.

We must, therefore, determine whether the Secretary of Transportation has issued regulations that substantially subsume the subject of the movement of trains at grade crossings. The parties focus primarily on federal regulations governing train speed and air brake testing. The Village argues its ordinance does not regulate train speed because it does not apply to moving trains or prescribe a minimum speed at highway grade crossings. Further, the Village argues a railroad's compliance with federal air brake testing regulations may constitute a circumstance beyond its reasonable control. Thus, the ordinance may provide an affirmative defense when a train blocks a

crossing while the crew diligently conducts federally mandated air brake tests. Wisconsin Central responds that the Village's ordinance interferes with consistent application of federal regulations on speed and air brake testing.

Initially, we note that preemption does not depend upon a single federal regulation covering the subject matter of a state law. *Doyle*, 186 F.3d at 795. Rather, preemption may be found by examining related safety regulations and the overall structure of the regulations. *Doyle*, 186 F.3d at 795, citing *Easterwood*, 507 U.S. at 674, 123 L. Ed. 2d at 402-03, 113 S. Ct. at 1742.

The Secretary of Transportation has issued regulations setting maximum operating speeds for different classes of track. 49 C.F.R. §213.9(a) (1992); *Easterwood*, 507 U.S. at 662, 123 L. Ed. 2d at 395- 96, 113 S. Ct. at 1737. In *Easterwood*, the Supreme Court interpreted those regulations, asserting that "the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation." *Easterwood*, 507 U.S. at 674, 123 L. Ed. 2d at 402-03, 113 S. Ct. at 1742. The Court held that the regulations "should be understood as covering the subject matter of train speed with respect to track conditions, including the conditions posed by grade crossings." *Easterwood*, 507 U.S. at 675, 123 L. Ed. 2d at 403, 113 S. Ct. at 1743.

The Secretary has also issued detailed regulations on air brake testing. 49 C.F.R. pt. 232 (2006). Those regulations provide comprehensive requirements for inspection and testing of brake systems, and control

the timing and performance of tests and inspections. 49 C.F.R. §§232.201 through 232.219 (2006). Relevant to this case, the Secretary has issued regulations establishing the testing required following the removal of a car from a train and the interruption of brake pipe continuity. 49 C.F.R. §232.211 (2006). The movement of trains is restricted until the tests are completed and brake pipe pressure is restored. 49 C.F.R. §232.211 (2006).

Further, the Secretary has issued regulations on grade crossing safety. *See* 49 C.F.R. §§234.105, 234.106, 234.107 (2006). Those regulations control the speed of trains in the event of a failure, partial activation, or false activation of a grade crossing warning system and, in some circumstances, require trains to stop before proceeding through a crossing. 49 C.F.R. §§234.105, 234.106, 234.107 (2006).

These various regulations on train speed, air brake testing, and grade crossing safety work together to regulate and control the movement of trains at grade crossings. They control whether a train may be moved and the speed of a moving train. Taken together, the overall structure of these regulations substantially subsumes the subject matter of the movement of trains at grade crossings. We, therefore, find that the regulations manifest a clear intent to preempt the Village's ordinance on that subject matter.

We note that our decision on this issue is consistent with other federal and state cases considering preemption of similar blocked-crossing laws. *See CSX Transportation, Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002); *CSX Transportation, Inc. v. City of*

Mitchell, 105 F. Supp. 2d 949, 952 (S.D. Ind. 1999); *Krentz*, 589 Pa. at 604-05, 910 A.2d at 43-44; *City of Seattle v. Burlington Northern R.R. Co.*, 145 Wash. 2d 661, 673, 41 P.2d 1169, 1175 (2002). Although the blocked-crossing provisions in those cases are each somewhat different from the Village's ordinance, they are similar to the Village's ordinance because they regulate the movement of trains by prohibiting railroad obstructions at grade crossings in specified circumstances. *See CSX Transportation, Inc.*, 283 F.3d at 817; *CSX Transportation, Inc.*, 105 F. Supp. 2d at 951; *Krentz*, 589 Pa. at 600-01, 910 A.2d at 35; *City of Seattle*, 145 Wash. 2d at 667, 41 P.3d at 1172. Those blocked-crossing provisions were found to be preempted by federal regulations on train speed, train movement, or air brake testing. *CSX Transportation, Inc.*, 283 F.3d at 817; *CSX Transportation, Inc.*, 105 F. Supp. 2d at 952-53; *Krentz*, 589 Pa. at 601, 910 A.2d at 36; *City of Seattle*, 145 Wash. 2d at 673, 41 P.3d at 1175. Thus, those cases provide additional persuasive authority for our decision.

While based on different reasoning, other cases have reached the same result in finding blocked-crossing ordinances preempted by the FRSA. *See CSX Transportation, Inc. v. City of Plymouth, Michigan*, 86 F.3d 626 (6th Cir. 1996); *Rotter v. Union Pacific R.R. Co.*, 4 F. Supp. 2d 872 (E.D. Mo. 1998). A municipal ordinance establishing a train speed limit was also held preempted by the FRSA. *See City of Covington v. Chesapeake & Ohio Ry. Co.*, 708 F. Supp. 806 (E.D. Ky. 1989).

We have found one reported case that held a blocked-crossing provision was not preempted by the

FRSA. *See State v. Wheeling & Lake Erie Ry. Co.*, 139 Ohio App. 3d 271, 743 N.E.2d 513 (2000). In that case, the court construed the subject matter of an Ohio blocked-crossing statute as governing the length of time a stopped train may block a highway grade crossing. The court held that the statute was not preempted because there was no federal regulation addressing that specific subject matter. *Wheeling & Lake Erie Ry. Co.*, 139 Ohio App. 3d at 274, 743 N.E.2d at 514. The court also cited *State v. Chessie System R.R.*, No. 2494 (Oh. App. January 3, 1990) (unpublished), as support for its decision. There, the Ohio Appellate Court stated without analysis that "[a]s [the FRSA] expressly allows the states to regulate essentially local safety hazards, there is no explicit or implicit preemption of the subject matter of [the Ohio blocked-crossing statute]." *Chessie System R.R.*, No. 2494 (unpublished). The court went on to address a commerce clause argument by the Railroad that compliance with both the Ohio statute and federal regulations was impossible. The court held there was no evidence in the record of the physical impossibility of dual compliance with both the state and federal regulations. *Chessie System R.R.*, No. 2494 (unpublished).

These cases are distinguishable. First, in this case, we rejected the Village's argument that the ordinance's subject matter is the amount of time a standing train may obstruct a crossing. Rather, we determined that the subject matter of the Village's ordinance is the regulation of the movement of trains at highway grade crossings. Thus, the fact that there is no specific federal regulation governing the amount of time a standing train may block a highway grade crossing is

irrelevant to our analysis. As we have found, the federal regulations as a whole substantially subsume the subject matter of the movement of trains at grade crossings. The analysis in *Chessie System R.R.* is also unpersuasive because it does not employ the statutory standards for addressing a claim of preemption under section 20106 of the FRSA. Rather, the court simply stated the Ohio statute is not preempted by the FRSA and then addressed a commerce clause argument by one of the parties on whether compliance with both the federal regulations and the state statute "is a physical impossibility." *Chessie System R.R.*, No. 2494.

The Village has failed to direct our attention to any other federal or foreign state case holding a blocked-crossing provision was not preempted by the FRSA. The appellate court specifically commented that the Village "provide[d] no authority whatsoever in support of its position that the FRSA [did] not preempt its ordinance." 367 Ill. App. 3d at 430. In this court, the Village relies heavily upon the recent Illinois appellate court decision in *Eagle Marine Industries, Inc. v. Union Pacific R.R. Co.*, 363 Ill. App. 3d 1166 (2006). We accepted that case for review and, today, reverse based upon this opinion.

Having found that the Village's ordinance is preempted, we must next consider whether the saving clause in section 20106 applies to the ordinance. The saving clause provides that:

> "A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order–

(1) is necessary to eliminate or reduce an essentially local safety or security hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce."

49 U.S.C. §20106 (2000 & Supp. 2004).

Here, the Village's ordinance is adopted by reference from an Illinois statute. *See* 625 ILCS 5/18c–7402(1)(b) (West 2004). The parties argue extensively on whether the saving clause is applicable only to state enactments or also encompasses laws issued by a state's political subdivisions. In our view, there is considerable uncertainty as to whether the term "State" is intended to apply only to state enactments or may also include those of a political subdivision. We need not decide that issue, however, because we conclude that even if the ordinance is treated as a state statute, the saving clause does not apply.

Overall, the ordinance fails to satisfy at least two prongs of the saving clause because it is incompatible with the federal regulations on train speed and air brake testing and it burdens interstate commerce. It is, therefore, unnecessary to discuss the first prong of the saving clause on local safety or security hazards. First, viewing train speed, the Village's ordinance prohibits rail carriers from obstructing highway grade crossings for more than 10 minutes. There are exceptions to this prohibition if the train is "continuously moving" or cannot be moved due to circumstances beyond the rail carrier's reasonable

control. The ordinance, therefore, requires a train that stops for a reason within its control to clear the crossing within 10 minutes.

In those circumstances, the train may be required to adjust its speed or length to clear the crossing within 10 minutes to avoid violating the ordinance. *See CSX Transportation, Inc.*, 283 F.3d at 817 ("the amount of time a moving train spends at a grade crossing is mathematically a function of the length of the train and the speed at which the train is traveling"). The appellate court aptly summarized, "[p]ut another way, the regulation here is a regulation of train speed and length, although it applies only when a train stops at a crossing." 367 Ill. App. 3d at 428.

The Supreme Court has interpreted the federal regulations covering train speeds to preclude additional state regulation. *Easterwood*, 507 U.S. at 674, 123 L. Ed. 2d at 402-03, 113 S. Ct. at 1742. The federal regulations apply to all track conditions including those at grade crossings. *Easterwood*, 507 U.S. at 675, 123 L. Ed. 2d at 403, 113 S. Ct. at 1743. Thus, the Village's ordinance regulating train speed at grade crossings is incompatible with federal regulations on that subject. Furthermore, the Supreme Court has held that any state regulation of train length violates the commerce clause. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775, 89 L. Ed. 1915, 1928, 65 S. Ct. 1515, 1523 (1945). The ordinance, therefore, also fails to satisfy the third prong of the saving clause because it unreasonably burdens interstate commerce.

Next, considering the federal air brake testing regulations, we find the decision in *Krentz* persuasive. In that case, the Pennsylvania Supreme Court reviewed a blocked-crossing statute that had been interpreted as prohibiting trains from remaining stationary at highway grade crossings for an unreasonable period of time. *Krentz*, 589 Pa. at 601, 910 A.2d at 35. The determination of whether the time period of the obstruction was reasonable was a question for the jury. *Krentz*, 589 Pa. at 601, 910 A.2d at 35. In concluding that the blocked-crossing statute was incompatible with the federal brake system regulations, the court stated, "Simply put, the FRSA brake system regulations direct trains to remain stationary, while [the Pennsylvania statute] instructs them to keep moving." *Krentz*, 589 Pa. at 602-03, 910 A.2d at 36. In reviewing whether the time period of the obstruction was reasonable, the Court stated:

> "The issue of whether the FRSA preempts [the Pennsylvania statute] cannot be relegated to resolution on such a case-by-case basis. If the liability of a railroad for obstructing a given crossing depended upon the facts of each individual case, then the very essence of the FRSA as a comprehensive scheme of uniform railroad safety standards would be thwarted." *Krentz*, 589 Pa. at 602, 910 A.2d at 35-36.

Similar to the Pennsylvania statute, the Village's ordinance requires rail carriers to show that the cause of the obstruction is not within their reasonable control. The Village's ordinance calls for the same type of individualized, case-by-case determinations rejected in *Krentz*. Indeed, the Village asserts that a railroad's

diligent compliance with federal air brake testing regulations "*may* constitute a circumstance beyond the control of the railroad." (Emphasis added.) However, the Village also argues that a mechanical failure is not necessarily a defense if the failure could have been detected by routine and regular inspections. These arguments illustrate the detailed case-by-case review of the railroad's conduct required by the ordinance. The inquiry also strikes at the crux of the federal regulatory scheme of inspections and tests. We agree with the *Krentz* court that this type of individualized, case-by-case review is inconsistent with the FRSA's comprehensive set of uniform safety standards.

In sum, the saving clause does not apply because the ordinance is incompatible with the federal regulations on train speed and air brake testing. We conclude that the Village's ordinance is preempted by the FRSA and is, therefore, unenforceable. Because we have concluded that the ordinance is preempted by the FRSA, we need not consider the Village's argument that the trial court did not err in applying the ordinance to the facts of this case. Accordingly, we affirm the appellate court's conclusion that the Village's ordinance is preempted by the FRSA.

III. CONCLUSION

For the foregoing reasons, the judgment of the appellate court is affirmed.

Affirmed.

APPENDIX B

IN THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

No. 2--05--0492

[Filed September 6, 2006]

THE VILLAGE OF MUNDELEIN,	)
	)
Plaintiff-Appellee,	)
	)
v.	)
	)
WISCONSIN CENTRAL RAILROAD,	)
	)
Defendant-Appellant.	)
	)

Appeal from the Circuit Court of Lake County
No. 05--OV--276
Honorable Raymond D. Collins, Judge, Presiding.

JUSTICE HUTCHINSON delivered the opinion of the court:

Following a bench trial, defendant, Wisconsin Central Railroad, was found guilty of violating an ordinance enacted by plaintiff, the Village of Mundelein (the Village), prohibiting the obstruction of

a highway at a railroad grade crossing. The trial court fined defendant $14,000 plus costs. Defendant timely appeals, contending that the Village's enforcement and application of its ordinance is preempted by the Federal Railroad Safety Authorization Act of 1994 (the FRSA) (49 U.S.C. § 20101 *et seq.* (2000 & Supp. II 2002)). For the reasons that follow, we reverse the trial court's judgment and vacate the fine.

Section 10.20.010 of the Village's municipal code adopts by reference the provisions of the Illinois Vehicle Code (the Vehicle Code) (625 ILCS 5/1--100 *et seq.* (West 2004)) as its vehicle code. *See* Mundelein Municipal Code §10.20.010 (1989). As it pertains here, the obstruction of a highway at a grade crossing by a train is addressed in chapter 18c of the Vehicle Code, titled the Illinois Commercial Transportation Law (the Transportation Law) (625 ILCS 5/18c--1101 *et seq.* (West 2004)). Section 18c--7402(1)(b) of the Transportation Law (625 ILCS 5/18c--7402(1)(b) (West 2004)), titled "Safety Requirements for Railroad Operations," provides in pertinent part as follows:

> "It is unlawful for a rail carrier to permit any train, railroad car or engine to obstruct public travel at a railroad-highway grade crossing for a period in excess of 10 minutes, except where such train or railroad car is continuously moving or cannot be moved by reason of circumstances over which the rail carrier has no reasonable control.
>
> *** Under no circumstances will a moving train be stopped for the purposes of issuing a

citation related to this Section." 625 ILCS 5/18c--7402(1)(b) (West 2004).

The record reflects that on January 17, 2005, defendant was issued a citation for violating the Village's ordinance by blocking the highway grade crossing at Hawley Street in the Village for 157 minutes. On March 31, 2005, defendant filed an offer of proof in support of its argument that it was not guilty. In its offer of proof, defendant argued that it did not violate the ordinance, because the train was stopped at the crossing for reasons beyond its reasonable control. Defendant also argued that enforcement of the Village's ordinance was preempted by the ICC Termination Act of 1995 (the ICCTA) (49 U.S.C. §10101 *et seq.* (2000)) and by the FRSA (49 U.S.C. §20101 *et seq.* (2000 & Supp. II 2002)). On April 6, 2005, the Village filed its response to defendant's offer of proof, and on April 22, 2005, the trial court conducted a bench trial.

The parties stipulated that defendant's train blocked the crossing for the duration of time indicated in the citation. Defendant proceeded with the testimony of Bernard Kareka, the conductor of defendant's train. Kareka's testimony reflected that, on January 17, 2005, he was operating defendant's train through the Village. The train consisted of 3 locomotive engines and 119 cars and had been stopped in Lake Villa for approximately three to four hours prior to Kareka and an engineer's arrival. The crew that was to bring the train through the Village consisted of Kareka and the engineer. The crew had boarded the train earlier in the morning at Lake Villa, where the train had been secured by the previous

crew. Kareka testified that, when he boarded the train at Lake Villa, the previous crew had left a note on the train, indicating that they had problems with the air brakes on the train. Kareka testified that the previous conductor had also fixed a couple of air leaks on the train and changed the gaskets between the air hoses.

Kareka's testimony further reflected that he looked over the first head cars of the train to locate hand brakes, and the engineer looked over the locomotives. The crew then conducted a job briefing, reviewed paperwork, and made sure any cars containing hazardous material were properly placed in the train. The crew also conducted an air brake test called a "set and release test" and verified that the air pressure on the rear of the train was within 15 pounds of the pressure on the front of the train. Kareka explained that federal regulations require verification that brakes are in operating order when an engineer boards a locomotive. He further explained that, as a crew taking over a train already en route, they were not required to perform any tests beyond what they did nor were they required to conduct an inspection of the entire length of the train.

The train departed Lake Villa and headed south toward the Village. As the train was approaching the Village, the crew received an indication from a "hot box" detector that there was dragging equipment on the rear car of the train. In accordance with defendant's operating procedures, the engineer began to slow the train, intending to stop the train and investigate. At that point, though, the train experienced a sudden loss of air pressure, which caused the emergency brakes to apply on each car on

the train. The crew tried to restore air pressure, but the end-of-train indicator showed that the air brake system pressure on the rear of the train would not come up.

Kareka departed the lead locomotive and began walking the length of the train to inspect the train. During his inspection, Kareka discovered that an angle cock was out of position on a car approximately five or six cars forward from the 76th car. He explained that an angle cock is a valve that regulates the flow of air through the train's brake line in each car. Kareka opined that the problem with the angle cock could have been caused by sabotage, by debris that may have knocked the valve out of position while the train was in motion, or by vibration. Kareka further opined that, when the engineer applied a minimum amount of brake pressure when the train began to pass through the Village, it was possible that the brakes applied in the front portion of the train but, due to the angle cock being out of position, not in the rear portion of the train. The effect would have been that the rear portion ran into the front portion. Kareka straightened the angle cock on the car.

When Kareka reached the 76th car of the train, he discovered that a "drawbar," a connecting bar between train cars, had failed and fallen off on the rear end of the 76th car. Kareka testified that a drawbar breaking would cause an emergency brake application. He also noticed that, when the drawbar broke off, it fell under the next couple of cars in the train, damaging the hose on the following car. Kareka testified that the train had broken into two sections. Kareka testified that the crew had no reason to think that the air pressure

would not be working once the air test performed that morning in Lake Villa had been successful.

Upon assessing the damage, the crew situated the rear of the train just north of Dunbar Road in the Village and brought the rest of the train, including the car with the failed drawbar, south to set out and leave the defective car on a spur track. They then reversed the train, and the engineer shoved it back to reconnect with the rear part still sitting north of Dunbar Road. During this time, no crossings were obstructed.

Next, the crew began the process of tying the train back together and conducting required brake tests so that the train could proceed to Schiller Park. With the train reconnected, the crew checked the brake system air pressure, but the brake pressure on the rear of the train was not restored to an acceptable level required for departure. Again, Kareka inspected the train, checking for leaks in the air brake system. A crew on another train on an adjoining track assisted in inspecting the train and looking for leaks. During this inspection, the train was blocking Hawley Street in the Village. The crew ultimately cut the train, or broke it apart, twice to allow passengers on and off a Metra train at the Village's train station. Upon cutting the train, the forward portion had proper air pressure. When the train was cut the second time, the railroad dispatcher directed the crew to take the forward portion to Schiller Park. Another train came by, and its crew tied up and took the remaining portion to Schiller Park.

Following the arguments of the parties, the trial court found that the enforcement of the Village's

ordinance was not preempted by federal law and regulations. The trial court further found that the circumstances resulting in the blockage of the grade crossing were within defendant's reasonable control. The trial court found that, if the crew had conducted a visual inspection of the train prior to leaving Lake Villa, they may have discovered the angle cock being out of position. The trial court also noted that the train had been idle for several hours before the new crew took it over in Lake Villa, that there was a report of issues with the air brakes, and that no visual inspection was conducted. The trial court believed that such an inspection could have identified the problem, which the trial court concluded was a circumstance within defendant's control. In finding defendant guilty of violating the ordinance, the trial court fined defendant $14,000 plus costs. Defendant timely appeals.

The contentions that defendant raises on appeal are (1) that enforcement of the Village's ordinance is preempted by the FRSA (49 U.S.C. §20101 *et seq.* (2000 & Supp. II 2002)), and (2) that the trial court, in finding that defendant should have conducted additional investigation of the train prior to its departure from Lake Villa, imposed additional duties of inspection and investigation on defendant in an area of law that is preempted by the FRSA. Defendant argues that court decisions and the express provisions of the FRSA establish the FRSA's preemptive effect on state statutes and local ordinances. Defendant concludes that it was entitled to judgment in its favor because the Village's ordinance was unenforceable.

Federal preemption of municipal ordinances is governed by the same standards that apply to federal preemption of state law. *See Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 605, 115 L. Ed. 2d 532, 543, 111 S. Ct. 2476, 2482 (1991). Pursuant to the supremacy clause of the United States Constitution (U.S. Const., art. VI, cl. 2), Congress has the authority to preempt state law. *English v. General Electric Co.*, 496 U.S. 72, 78-79, 110 L. Ed. 2d 65, 74-75, 110 S. Ct. 2270, 2275 (1990). Three ways exist in which federal law may preempt state law: (1) when the language of the federal statute expressly preempts state law; (2) when the scope of the statute indicates that Congress intended federal law to occupy the field exclusively; or (3) when state law is in actual conflict with federal law. *Sprietsma v. Mercury Marine*, 537 U.S. 51, 64, 154 L. Ed. 2d 466, 478-79, 123 S. Ct. 518, 527 (2002). In determining whether Congress has preempted state law, this court examines congressional intent. *Van Der Molen v. Washington Mutual Finance, Inc.*, 359 Ill. App. 3d 813, 818 (2005). This examination begins with the assumption that Congress did not intend to displace state law. *Van Der Molen*, 359 Ill. App. 3d at 818, citing *Maryland v. Louisiana*, 451 U.S. 725, 746, 68 L. Ed. 2d 576, 595, 101 S. Ct. 2114, 2129 (1981). When preemption is invoked to prevent a state or municipality from wielding its traditional police powers, congressional intent to displace that authority must be "clear and manifest." *See Mortier*, 501 U.S. at 605, 115 L. Ed. 2d at 543, 111 S. Ct. at 2482. Whether a federal enactment preempts a state statute or, in this case, a municipal ordinance that adopts a state statute, is a question of law, subject to *de novo* review. *See Van Der Molen*, 359 Ill. App. 3d at 818.

Although defendant presented an argument to the trial court that enforcement of the Village's ordinance is preempted by the ICCTA, it did not pursue the argument at the appellate level. We note that at least one federal appeals court has construed the ICCTA and concluded that it expressly preempted state and local laws. *See Friberg v. Kansas City Southern Ry. Co.*, 267 F.3d 439, 443-44 (5th Cir. 2001) (explaining that regulating the time a train may occupy a rail crossing impacts the way a railroad operates its trains regarding such areas as train speed, length, and scheduling). We must also note, though, that a reviewing court in this state recently determined that the ICCTA did not preempt the state statute on which the Village's ordinance was based. *See Eagle Marine Industries, Inc. v. Union Pacific R.R. Co.*, 363 Ill. App. 3d 1166, 1180-82 (5th Dist. 2006). In any event, because defendant did not present an argument to this court based on the *Friberg* analysis or holding, we decline to consider whether the ICCTA preempts the enforcement of the Village's ordinance. *See Dineen v. City of Chicago*, 125 Ill. 2d 248, 266 (1988). Accordingly, we will proceed with our consideration of whether the FRSA preempts the Village's ordinance.

Enacted in 1970, the FRSA contemplated a comprehensive and uniform set of safety regulations in all areas of railroad operations. *Chicago Transit Authority v. Flohr*, 570 F.2d 1305, 1308-09 (7th Cir. 1977). The FRSA's purpose is to "promote safety in every area of railroad operations and [to] reduce railroad-related accidents and incidents." 49 U.S.C. §20101 (2000); *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658, 661, 123 L. Ed. 2d 387, 395, 113 S. Ct. 1732, 1736 (1993). The FRSA specifically

directs the Secretary of Transportation to study and develop solutions to safety problems posed by grade crossings. 49 U.S.C. §20102 (2000); *Easterwood*, 507 U.S. at 661-62, 123 L. Ed. 2d at 395, 113 S. Ct. at 1736. The FRSA authorizes the Secretary of Transportation to promulgate rules, regulations, and standards for every area of railroad safety. 49 U.S.C. §20103(a) (Supp. II 2002); *Easterwood*, 507 U.S. at 662, 123 L. Ed. 2d at 395, 113 S. Ct. at 1736.

Section 20106 of the FRSA governs the preemptive effect of these regulations, containing express savings and preemption clauses, and provides as follows:

> "Laws, regulations, and orders related to railroad safety and laws, regulations, and orders related to railroad security shall be nationally uniform to the extent practicable. A State may adopt or continue in force a law, regulation, or order related to railroad safety or security until the Secretary of Transportation (with respect to railroad safety matters), or the Secretary of Homeland Security (with respect to railroad security matters), prescribes a regulation or issues an order covering the subject matter of the State requirement. A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce." 49 U.S.C. §20106 (Supp. II 2002).

Therefore, in the present case, we must first consider whether the Village's ordinance is "related to" railroad safety, *i.e.*, whether section 20106 of the FRSA applies. If the Village's ordinance does relate to railroad safety, then we must consider whether the Secretary of Transportation or the Secretary of Homeland Security has issued orders or regulations "covering" the same subject matter as the Village's ordinance pertaining to the operation of trains at grade crossings, *i.e.*, whether there is preemption under section 20106 of the FRSA. If either of these federal agencies has issued orders or regulations "covering" the subject matter of the Village's ordinance, then we must next consider whether the ordinance meets the three requirements under section 20106 so as to be exempted from preemption.

The Village generally asserts that the ordinance does not relate to railroad safety but serves only to "facilitate the orderly flow of vehicular traffic throughout the Village." In *Easterwood*, the Court noted that the phrase "relating to" railroad safety is given a broad interpretation. *Easterwood*, 507 U.S. at 664, 123 L. Ed. 2d at 397, 113 S. Ct. at 1738, citing *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383-84, 119 L. Ed. 2d 157, 167-68, 112 S. Ct. 2031, 2037 (1992). A federal statute that expressly calls for

preemption of matters "relating to" the subject matter of that statute preempts "actions having a connection with or reference to" that subject matter. *Morales*, 504 U.S. at 384, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037. Therefore, in determining whether the Village's ordinance "relates to" railroad safety, we must determine whether there is the requisite "connection with or reference to" railroad safety. *See Morales*, 504 U.S. at 384, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037; *see also CSX Transportation, Inc. v. City of Plymouth, Michigan*, 86 F.3d 626, 629 (1996).

In the present case, the Village adopted the provisions of the Illinois Vehicle Code as its vehicle code. *See* Mundelein Municipal Code §10.20.010 (1989). The ordinance at issue here pertaining to the obstruction of a highway by a train at a grade crossing is codified in the section of the Transportation Law that deals with regulations of railroads, that is, section 18c--7402(1)(b) of the Transportation Law, titled "Safety Requirements for Railroad Operations." *See* 625 ILCS 5/18c--7402(1)(b) (West 2004). Therefore, on its face, the title of the Village's ordinance clearly makes "reference to" railroad safety. *See Morales*, 504 U.S. at 384, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037. The plain language of the ordinance makes clear that the ordinance is directed at rail carriers and applies only to trains, railroad cars, and engines and not to any other vehicle or entity that may cause an obstruction at a crossing--it applies only to railroads. Because the plain language of the Village's ordinance establishes the requisite "connection with or reference to" railroad safety (*see Morales*, 504 U.S. at 384, 119 L. Ed. 2d at 167, 112 S. Ct. at 2037), the provisions of the

Village's ordinance fall within the scope of section 20106 of the FRSA.

We next consider whether the Secretary of Transportation or the Secretary of Homeland Security has issued orders or regulations "covering" the same subject matter as the Village's ordinance pertaining to the operation of trains at grade crossings, *i.e.*, whether there is preemption under section 20106 of the FRSA. In the present case, defendant, as the party seeking preemption, must establish more than that the federal orders or regulations "touch upon" or "relate to" railroad safety. *See Easterwood*, 507 U.S. at 664, 123 L. Ed. 2d at 397, 113 S. Ct. at 1738. Section 20106 of the FRSA provides that "[l]aws, regulations, and orders related to railroad safety shall be nationally uniform to the extent possible." 49 U.S.C. §20106 (Supp. II 2002). Therefore, in determining whether the provisions of the FRSA preempt the Village's ordinance, we must consider whether federal orders or regulations have been issued "covering" the subject matter, that is, "substantially subsum[ing] the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664, 123 L. Ed. 2d at 397, 113 S. Ct. at 1738. It is not necessary for the federal regulation to be identical for preemption to apply. *Easterwood*, 507 U.S. at 675, 123 L. Ed. 2d at 403-04, 113 S. Ct. at 1743.

In *Easterwood*, 507 U.S. 658, 123 L. Ed. 2d 387, 113 S. Ct. 1732, the United States Supreme Court reviewed whether the FRSA preempted certain claims for negligence. The plaintiff brought a wrongful-death action against a railroad company, following the death of her spouse. The plaintiff alleged, *inter alia*, that the railroad company was negligent under Georgia law for

failing to maintain adequate warning devices at the crossing and for operating its train at an excessive speed. The Supreme Court held that, under the FRSA, federal regulations adopted by the Secretary of Transportation preempted the plaintiff's negligence action only insofar as it asserted that the railroad company's train was traveling at an excessive speed. *Easterwood*, 507 U.S. at 675, 123 L. Ed. 2d at 404, 113 S. Ct. at 1743. In so holding, the Supreme Court explained that, although the federal regulations addressed only the maximum speeds at which trains were permitted to travel given the nature of the tracks on which they operate, the overall structure of the Secretary's regulations demonstrated that the speed limits were adopted with safety concerns in mind and should be understood as "covering the subject matter" in question. *Easterwood*, 507 U.S. at 674-75, 123 L. Ed. 2d at 402-03, 113 S. Ct. at 1742-43. Therefore, even though no particular regulation addressed state regulation of train speed, the *Easterwood* Court found preemption through a series of related regulations. *Easterwood*, 507 U.S. at 675, 123 L. Ed. 2d at 403-04, 113 S. Ct. at 1743.

In the present case, defendant argues that the FRSA preempts enforcement of the Village's ordinance and that the savings clause providing exceptions to preemption in section 20106 does not apply. Defendant asserts that the Secretary of Transportation has issued a number of regulations that substantially subsume the subject matter that the Village's ordinance covers and lists the following: (1) regulations concerning when and how a railroad may transport defective rail cars (49 C.F.R. §232.15 (2005)); (2) regulations directing that an emergency brake application shall

occur when there is a rupture in the brake system (49 C.F.R. §232.103 (2005)); (3) regulations concerning air brake testing after a rupture in brake pipe continuity (49 C.F.R. §232.211 (2005)); and (4) regulations concerning what tests and inspections are required when a new train crew takes over a train that is already in transit between terminals (49 C.F.R. §§232.203, 232.205, 232.215 (2005)). Defendant concludes that enforcement of the Village's ordinance is preempted pursuant to section 20106 of the FRSA because these regulations substantially subsume the subject matter.

In support of its argument, defendant cites *CSX Transportation, Inc. v. City of Mitchell, Indiana*, 105 F. Supp. 2d 949 (S.D. Ind. 1999), and *CSX Transportation, Inc. v. City of Plymouth, Michigan*, 283 F.3d 812 (6th Cir. 2002). In *Mitchell*, the railroad company brought an action against the municipality seeking declaratory and injunctive relief to prevent the municipality's enforcement of a state statute prohibiting trains from occupying railroad crossings for more than 10 minutes. The Indiana statute provided:

> "It shall be unlawful for a railroad corporation to permit any train, railroad car or engine to obstruct public travel at a railroad-highway grade crossing for a period in excess of ten (10) minutes, except where such train, railroad car or engine cannot be moved by reason of circumstances over which the railroad corporation has no control." *Mitchell*, 105 F. Supp. 2d at 951, citing Ind. Code §8-6-7.5-1 (____).

The district court granted summary judgment in favor of the railroad company, holding that enforcement of the statute was preempted by the FRSA. *Mitchell*, 105 F. Supp. 2d at 952-53. The district court found that the city's enforcement of the statute frustrated the railroad company's compliance with federal regulations governing train speed, train length, and trains in motion, as well as air brake testing and the use of flagmen. *Mitchell*, 105 F. Supp. 2d at 952.

In *Plymouth*, the Sixth Circuit affirmed a district court ruling that Michigan's anti-blocking statute was preempted by the FRSA and that it also violated the commerce clause of the United States Constitution (U.S. Const., art. I, §8, cl. 3). *Plymouth*, 283 F.3d at 814. The Michigan statute at issue provided:

> "A railroad shall not permit a train to obstruct vehicular traffic on a public street or highway for longer than 5 minutes at any 1 time, except the obstruction shall not be considered a violation under the following circumstances:
>
> (a) If the train is continuously moving in the same direction at not less than 10 miles per hour for not longer than 7 minutes.
>
> (b) If the railroad can show that the incident occurred as a result of a verifiable accident, mechanical failure, or unsafe condition." *Plymouth*, 283 F.3d at 817, citing Mich. Comp. Laws Ann. §462.391 (West ____).

The district court had determined that, by limiting the amount of time a moving train could block a grade crossing, the Michigan statute was effectively regulating a train's speed, length, and performance of air brake testing. *Plymouth*, 283 F.3d at 816. On appeal, the Michigan Attorney General contended that the subject matter of the statute was "the time that trains may block highway traffic." *Plymouth*, 283 F.3d at 817. The court of appeals was unpersuaded by the Attorney General's position, explaining that "the amount of time a moving train spends at a grade crossing is mathematically a function of the length of the train and the speed at which the train is traveling." *Plymouth*, 283 F.3d at 817. The court of appeals concluded that the Michigan statute would require the railroad company to modify either the speed at which its trains travel or their length, and would also restrict the railroad company's performance of federally mandated air brake tests. *Plymouth*, 283 F.3d at 817. The court of appeals determined that, to the extent that the Michigan statute sought to modify the length of trains, the United States Supreme Court had already determined that that type of regulation violated the commerce clause. *Plymouth*, 283 F.3d at 817. In affirming the district court's ruling, the court of appeals also noted that "numerous" federal regulations covered the speed at which trains may travel and the stops that trains must make to test their air brakes, and thus, the federal regulations "'substantially subsume the subject matter of the relevant state law.'" *Plymouth*, 283 F. 3d at 817, quoting *Easterwood*, 507 U.S. at 664, 123 L. Ed. 2d at 397, 113 S. Ct. at 1738.

In the present case, and as stated above, the Village's ordinance provides as follows:

> "It is unlawful for a rail carrier to permit any train, railroad car or engine to obstruct public travel at a railroad-highway grade crossing for a period in excess of 10 minutes, except where such train or railroad car is continuously moving or cannot be moved by reason of circumstances over which the rail carrier has no reasonable control.
>
> *** Under no circumstances will a moving train be stopped for the purposes of issuing a citation related to this Section." Mundelein Municipal Code §10.20.010 (1989), adopting 625 ILCS 5/18c--7402(1)(b) (West 2004).

The Village's ordinance is similar to the Michigan and Indiana statutes to the extent that the subject matter of each pertains to the time that trains may obstruct a grade crossing, thereby blocking vehicular traffic. Also similar to the Michigan and Indiana statutes is the provided exception to the violation, under which the rail carrier bears the burden to establish that the violation occurred by reason of circumstances beyond its reasonable control, *i.e.*, a verifiable accident, mechanical failure, or an unsafe condition. Both the Sixth Circuit Court of Appeals and the District Court of the Southern District of Indiana have presented reasonable and logical analyses in determining that federal regulations have been promulgated to cover, *inter alia*, train speed and length such that the FRSA preempts any other entity's enactment regulating, even indirectly, the subject matter of speed, train

length, and the performance of air brake tests. *See Plymouth*, 283 F.3d at 816-17; *Mitchell*, 105 F. Supp. 2d at 952-53.

Despite the similarities, the Village's ordinance is different from the Indiana statute in that the Village's ordinance restricts a train from obstructing the grade crossing for more than 10 minutes if the train stops in the crossing. Therefore, the question is whether that difference saves the ordinance from preemption. Our analysis leads us to the conclusion that it does not. We note that the Secretary of Transportation has promulgated regulations setting maximum train speeds for different classes of track. *See* 49 C.F.R. §213.9 (1998); *Waymire v. Norfolk & Western Ry. Co.*, 218 F.3d 773, 776 (7th Cir. 2000). As we discussed above, in *Easterwood*, the Supreme Court held that the FRSA preempted a state claim for negligence based on excessive speed. The *Easterwood* Court recognized that the federal regulations addressed only maximum speeds at which trains were permitted to travel, but noted that "the speed limits must be read as not only establishing a ceiling, but also precluding additional state regulation." *Easterwood*, 507 U.S. at 674, 123 L. Ed. 2d at 402-03, 113 S. Ct. at 1742. The *Easterwood* Court stated that the regulations "should be understood as covering the subject matter of train speed with respect to the track conditions, including the conditions posed by grade crossings." *Easterwood*, 507 U.S. at 675, 123 L. Ed. 2d at 403, 113 S. Ct. at 1743.

In the present case, the Village's ordinance applies to all trains traveling through the Village. The Village's ordinance imposes a condition that is related

to a train's speed and length by restricting the train from obstructing a grade crossing for more than 10 minutes if the train stops in the crossing. Enforcement of the Village's ordinance reveals how the ordinance regulates train speed and length. For example, if a train takes more than 10 minutes to pass a grade crossing, then the train must be in continual motion or else it would be in violation of the Village's ordinance. Essentially, the Village's ordinance requires a train to do one of two things when passing a crossing: (1) do not stop, or (2) stop but clear quickly. The question is whether the Village can require both of those things; the answer is that it can require neither. To achieve compliance, the Village's ordinance compels railroad carriers to either adjust the length of their trains, *e.g.*, by having a higher volume of shorter trains, or adjust the speed at which the trains are traveling. Put another way, the regulation here is a regulation of train speed and length, although it applies only when a train stops at a crossing. Because the Village's ordinance regulates train speed and length, and any attempt to regulate train speed and length is preempted by the FRSA, the Village's ordinance is preempted by the FRSA. *See Plymouth*, 283 F.3d at 816-17; *Mitchell*, 105 F. Supp. 2d at 952-53.

Moreover, the Village's ordinance facially regulates train speed by including an exception that exempts a train from a violation "where such train or railroad car is continuously moving." Mundelein Municipal Code §10.20.010 (1989), adopting 625 ILCS 5/18c--7402(1)(b) (West 2004). By requiring a train to either clear a grade crossing within 10 minutes or be in continuous movement, the ordinance regulates the train's speed and its length. It is uncontroverted that "numerous"

federal regulations cover the subject matter of speed at which trains may travel, based on the class of track. *See* 49 C.F.R. §§213.9 (reflecting that a freight train may not exceed 10 miles per hour on a Class 1 track, whereas a passenger train may travel as fast as 90 miles per hour on a Class 5 track); 213.307 (reflecting allowable speeds up to 200 miles per hour); 213.57 (reflecting operating speeds for negotiating a curve) (2005); *Plymouth*, 283 F.3d at 817. Based on our review of the Village's ordinance and the relevant authorities, we conclude that the Village's ordinance is preempted by the FRSA.

The Supreme Court has held that state regulation of train length also violates the commerce clause. *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 89 L. Ed. 1915, 65 S. Ct. 1515 (1945). By limiting the amount of time a train may block a grade crossing, the Village's ordinance also restricts the rail carrier's performance of federally mandated air brake tests. *See Plymouth*, 283 F.3d at 817. Grade crossing safety is another area covered by federal regulations. *See* 49 C.F.R. §§234.105, 234.106, 234.107 (2005). Because the overall structure of the Secretary's regulations demonstrates that speed limits and grade crossing regulations were adopted with safety concerns in mind, the federal regulations "substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664, 123 L. Ed. 2d at 397, 113 S. Ct. at 1738. To the extent that the Village's ordinance regulates train speed and length and the performance of federally mandated air brake tests, and implicates grade crossing safety concerns, it is preempted by the FRSA, because the federal regulations "cover the subject matter." *See Easterwood*,

507 U.S. at 675, 123 L. Ed. 2d at 403, 113 S. Ct. at 1743; *Plymouth*, 283 F.3d at 817; *Friberg*, 267 F.3d at 443; *Mitchell*, 105 F. Supp. 2d at 952. But see *Eagle Marine Industries, Inc.*, 363 Ill. App. 3d at 1183 (holding that section 18c--7402(a)(b) of the Vehicle Code was not preempted by the FRSA).

Other courts have concluded likewise in similar circumstances. *See Rotter v. Union Pacific R.R. Co.*, 4 F. Supp. 2d 872, 874 (E.D. Mo. 1998) (holding that the FRSA preempted a municipal ordinance prohibiting a railroad from blocking a crossing for more than five minutes); *City of Seattle v. Burlington Northern R.R. Co.*, 41 P.3d 1169, 1174 (Wash. 2002) (holding that the FRSA preempted city ordinances regulating street blockages for periods over four minutes because they affected "the speed at which trains travel, train length, and trains in physical motion," areas regulated by the FRSA). Our determination that the Village's ordinance is preempted by the FRSA because it attempts to regulate train speed, train length, and grade crossing safety obviates the need for a discussion of whether the ordinance regulates federal air brake testing or the use of flagmen.

In responding to defendant's arguments and authority in support of preemption by the FRSA, the Village states, without any citation to supporting authority:

> "The Mundelein ordinance does not attempt to regulate train speed, train length, switching, or any other operational aspect, of the defendant's trains. The Mundelein ordinance only attempts to keep the Village roads clear of

> obstructions which affect the ability of emergency vehicles to respond to emergency calls and facilitate the orderly flow of vehicular traffic throughout the Village."

In asserting that the ordinance is not preempted by the FRSA, the Village presents little more than the foregoing conclusory statements of the ordinance's purported purpose. The Village fails to distinguish defendant's authority in any meaningful manner and wholly fails to address the *Plymouth* and *Mitchell* courts' analyses. Further, the Village provides no authority whatsoever in support of its position that the FRSA does not preempt its ordinance. Despite a presumption against federal preemption (*Van Der Molen*, 359 Ill. App. 3d at 818), without more, we are unpersuaded by the Village's response to defendant's preemption argument.

Having determined that the federal regulations cover the subject matter of the Village's ordinance and that the ordinance is, therefore, preempted by the FRSA, we next consider whether the ordinance can survive under the savings clause of section 20106 of the FRSA. Again, the savings clause provides:

> "A State may adopt or continue in force an additional or more stringent law, regulation, or order related to railroad safety or security when the law, regulation, or order--
>
> (1) is necessary to eliminate or reduce an essentially local safety or security hazard;

(2) is not incompatible with a law, regulation, or order of the United States Government; and

(3) does not unreasonably burden interstate commerce." 49 U.S.C. §20106 (Supp. II 2002).

Defendant argues that the savings clause does not apply, for two reasons. First, defendant argues that the savings clause does not apply to municipal ordinances but only to state laws or actions. *See Plymouth*, 86 F.3d at 628-29 (finding that the FRSA's savings clause does not apply to municipal ordinances). Second, defendant argues that the Village's ordinance fails to meet the requirements of the savings clause in that the plain language of the ordinance fails to state that it is addressing a uniquely local safety hazard; the ordinance is incompatible with the federal regulations and procedures in response to a casualty situation; and enforcing the ordinance would burden interstate commerce by frustrating the FRSA's goals of uniform national safety standards.

We first consider whether the savings clause encompasses municipal ordinances. Our review of the clause is guided by the well-established principles of statutory construction. The cardinal rule of statutory construction is to ascertain and give effect to the legislature's intent. *Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006), citing *People ex rel. Sherman v. Cryns*, 203 Ill. 2d 264, 279 (2003). The most reliable indication of that intent is the statutory language itself. *Southern Illinoisan*, 218 Ill. 2d at 415, citing *In re Madison H.*, 215 Ill. 2d 364, 372 (2005). We must afford the

language its plain, ordinary, popularly understood meaning. *Cryns*, 203 Ill. 2d at 279. When the language is unambiguous, the statute must be applied as written, without resorting to other aids of construction. *Lawrence v. Regent Realty Group, Inc.*, 197 Ill. 2d 1, 10 (2001).

In the present case, the plain language of section 20106 provides that these exceptions apply only to a "State" that "adopt[s] or continue[s] in force an additional or more stringent law, regulation, or order related to railroad safety or security." 49 U.S.C. §20106 (Supp. II 2002). Because the Village is not a "State," the Village's ordinance is not within the FRSA's savings clause exceptions. *See Plymouth*, 86 F.3d at 628. Other courts have held similarly that the savings clause does not apply to local governments or cover regulation by municipal ordinances. *See Donelon v. New Orleans Terminal Co.*, 474 F.2d 1108 (5th Cir. 1973); *CSX Transportation, Inc. v. City of Thorsby*, 741 F. Supp. 889, 891 (M.D. Ala. 1990); *City of Covington v. Chesapeake & Ohio Ry. Co.*, 708 F. Supp. 806, 808-09 (E.D. Ky. 1989); *CSX Transportation, Inc. v. City of Tullahoma*, 705 F. Supp. 385, 387-88 (E.D. Tenn. 1988).

We believe that the text and structure of the savings clause of section 20106 of the FRSA leaves no doubt that a municipality does not constitute a "State" and that the exception does not encompass municipal ordinances. *See Michigan Southern R.R. Co. v. City of Kendallville*, 251 F.3d 1152 (7th Cir. 2001). Because the Village is not a "State," the Village's ordinance does not fall within the FRSA's savings clause. Accordingly, we need not address the remaining three

requirements listed in the savings clause, because these exceptions apply only to states. *See Eagle Marine Industries, Inc.*, 363 Ill. App. 3d 1166 (considering the exceptions in reviewing section 18c--7402(1)(b) of the Vehicle Code).

The supremacy clause of the United States Constitution establishes that, when federal law conflicts with state or local law, the federal law must control. U.S. Const., art. VI, cl. 2; *see also Busch v. Graphic Color Corp.*, 169 Ill. 2d 325, 334 (1996). For the reasons discussed above, we find that the Village's ordinance is preempted by the FRSA and is unenforceable.

Because the Village's ordinance is preempted by the FRSA and is unenforceable, a discussion of whether the trial court correctly applied the ordinance when it found defendant guilty of violating the ordinance is not warranted. *See National Commercial Banking Corp. of Australia, Ltd. v. Harris*, 125 Ill. 2d 448, 454-55 (1988) (declining to address other issues presented by the parties on appeal because of its decision based on preemption).

For the foregoing reasons, we reverse the judgment of the circuit court of Lake County and vacate the fine.

Reversed; fine vacated.

O'MALLEY and GILLERAN JOHNSON, JJ., concur.

APPENDIX C

STATE OF ILLINOIS)
) SS.
COUNTY OF LAKE)

IN THE CIRCUIT COURT FOR THE 19TH JUDICIAL CIRCUIT LAKE COUNTY, ILLINOIS

No. 05 OV 276; 05 OV 277; 05 OV 278

[Dated April 22, 2005]

THE VILLAGE OF MUNDELEIN,)
)
Plaintiff,)
)
v.)
)
WISCONSIN CENTRAL RAILROAD,)
)
Defendant.)

REPORT OF PROCEEDINGS
April 22, 2005
1:30 P.M.

REPORT OF PROCEEDINGS had and testimony taken at the trial of the above-entitled cause, taken before the Honorable RAYMOND D. COLLINS, Judge

of said Court, taken at the Lake County Courthouse, 105 East Route 83, Mundelein, Illinois.

* *

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MR. BARRON: Thank you, Judge.

(Whereupon, a recess was taken.)

THE COURT: All right. I have had an opportunity to listen to the testimony that was presented live in court. I've had an opportunity to observe the witness while he was testifying, for his demeanor.

I've also reviewed the exhibit that was presented -- excuse me -- admitted into evidence. I've reviewed the offer of proof by the defense, which was given for all the cases that we have pending -- it's a similar offer of proof on all of them -- and the memorandum, with argument.

I've had an opportunity to review the response of the Village to that memorandum and offer of proof and an opportunity to review the Ordinance of the Village of Mundelein, which, in part, reads:

"It is unlawful for a rail carrier to permit any train, railroad car or engine to obstruct public travel at a railway grade crossing for a period in excess of 10 minutes, except where such train or rail car is

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continuously moving or cannot be moved by reason of circumstances over which the rail carrier has no reasonable control."

That is part of the Ordinance that is cited in the Village of Mundelein.

I look at all these cases on their own set of facts. I think that they're all different. I think the preemptions that are involved are all different, based on facts.

And this Court believes that the circumstances that revolve around this case were within the control or reasonable control of the rail carrier. The facts, as I heard them, were:

When the conductor took over the train in Lake Villa, there was a report of bad air. There was no testimony, pursuant to my notes, that there was any report given as to what was done about that situation or whether anything was done for repairs on that situation, only that there was a report given on bad air.

There was no visual inspection done of the train at that point. I asked the question at

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the end or close of the evidence as to whether that train could have been operated under air pressure regulations with that angle cock out or not in proper position. And the response was yes. In my mind, that

believes -- I believe that there is a situation where, if that visual inspection were done, there may have not been a problem; that this may have been a result of that angle cock not being in position, causing the subsequent repairs having to be done and the train breaking apart.

The train sat for three to four hours idle prior to the conductor taking the train over in Lake Villa. Again, based on the testimony of the conductor, we had weather conditions. It was in the teens. We've had testimony that temperature could effect the air pressure in the train. And there was no visual inspection done to the train, even though the weather was in the teens and there was a report given that there was bad air.

Again, prior to taking off from the Lake Villa, going southbound, toward Mundelein, there was no visual inspection done. Again, the Court

[p. 100]

believes that that may have -- was a circumstance reasonably within their control, that they could have possibly taken care of the problem that eventually occurred.

What they did at that point was brought up the air pressure to within 15 pounds of pressure, within up to 90, which they're required to do. And then they took off.

They went about their mandatory repairs and checks at the time after the train stopped. But in this

situation, there was also a subsequent event that led to not inconveniencing the Metra passengers and delaying them any further and clearing the crossings.

I cannot find in this set of facts a way to differentiate between the Federally-mandated inspection requirements and things that were within the control of the defendant. I don't see that there was any testimony given that there was one thing over the other. Therefore, I believe and -- and I'm going to make a finding of guilty on all three of the cases for the full amount of time that

[p. 101]

the blockings were crossed -- excuse me -- that the crossings were blocked.

And I don't believe, on this set of facts, that the FRSA would preempt the Local Ordinance, based on these facts that were given to me today. Therefore, on 05 OV 278, there's going to be a finding of guilty. There will be a one-year period of court supervision and a $500.00 fine total.

MR. LA LUZERNE: Judge, I think you're obligated, under the Statute, to impose the -- I'm not sure what the minimum is on that, Judge. But it has to be the minimum fine, plus the court cost.

THE COURT: Oh, the Statute requires plus cost?

MR. LA LUZERNE: Yes, Judge.

THE COURT: Defense agrees with that?

MR. BARRON: I'm sorry. What was that, Judge?

THE COURT: That the minimum fine, if I grant the minimum fine, it has to be plus cost.

MR. BARRON: Yes.

THE COURT: All right. It will be $500.00 plus cost.

[p. 102]

On 05 OV 277, there will be a finding of guilty, a one-year period of court supervision, $4,500.00, plus the court costs.

On 05 OV 276, there's going to be a finding of guilty, the one-year period of court supervision. And I believe that that fine is 14,000 plus court costs.

Is there anything else we need to do?

MR. BARRON: No, sir.

THE COURT: Mr. LaLuzerne?

MR. LA LUZERNE: Nothing else from Village, Judge.

THE COURT: All right. Thank you.

MR. BARRON: Thank you, Judge.

MR. LA LUZERNE: Off the record, Judge.

(Which were all the proceedings had in the above-entitled cause.)

APPENDIX D

Title 49: Transportation
PART 213—TRACK SAFETY STANDARDS
Subpart A—General

§ 213.9 Classes of track: operating speed limits.

(a) Except as provided in paragraph (b) of this section and §§213.57(b), 213.59(a), 213.113(a), and 213.137(b) and (c), the following maximum allowable operating speeds apply—

[In miles per hour]

Over track that meets all of the requirements prescribed in this part for—	The maximum allowable operating speed for freight trains is—	The maximum allowable operating speed for passenger trains is—
Excepted track	10	N/A
Class 1 track	10	15
Class 2 track	25	30
Class 3 track	40	60
Class 4 track	60	80
Class 5 track	80	90

* * *

Subpart C—Inspection and Testing Requirements

§ 232.211 Class III brake tests-trainline continuity inspection.

(a) A Class III brake test shall be performed on a train by a qualified person, as defined in §232.5, to test the train brake system when the configuration of the train has changed in certain ways. In particular, a Class III brake test shall be performed at the location where any of the following changes in the configuration of the train occur:

* * *

(2) Where a car or a block of cars is removed from the train with the consist otherwise remaining intact;

* * *

(b) A Class III brake test shall consist of the following tasks and requirements:

* * *

(4) Before proceeding the operator of the train shall know that the brake pipe pressure at the rear of freight train is being restored.

* * *

[66 FR 4193, Jan. 17, 2001, as amended at 67 FR 17583, Apr. 10, 2002]

PART 234—GRADE CROSSING SIGNAL SYSTEM SAFETY

Subpart C—Response to Reports of Warning System Malfunction

§ 234.105 Activation failure.

Upon receipt of a credible report of warning system malfunction involving an activation failure, a railroad having maintenance responsibility for the warning system shall promptly initiate efforts to warn highway users and railroad employees at the subject crossing by taking the following actions:

(a) Prior to any train's arrival at the crossing, notify the train crew of the report of activation failure and notify any other railroads operating over the crossing;

(b) Notify the law enforcement agency having jurisdiction over the crossing, or railroad police capable of responding and controlling vehicular traffic; and

(c) Provide for alternative means of actively warning highway users of approaching trains, consistent with the following requirements (see appendix B for a summary chart of alternative means of warning):

(1)(i) If an appropriately equipped flagger provides warning for each direction of highway traffic, trains may proceed through the crossing at normal speed.

(ii) If at least one uniformed law enforcement officer (including a railroad police officer)

provides warning to highway traffic at the crossing, trains may proceed through the crossing at normal speed.

(2) If an appropriately equipped flagger provides warning for highway traffic, but there is not at least one flagger providing warning for each direction of highway traffic, trains may proceed with caution through the crossing at a speed not exceeding 15 miles per hour. Normal speed may be resumed after the locomotive has passed through the crossing.

(3) If there is not an appropriately equipped flagger or uniformed law enforcement officer providing warning to highway traffic at the crossing, each train must stop before entering the crossing and permit a crewmember to dismount to flag highway traffic to a stop. The locomotive may then proceed through the crossing, and the flagging crewmember may reboard the locomotive before the remainder of the train proceeds through the crossing.

(d) A locomotive's audible warning device shall be activated in accordance with railroad rules regarding the approach to a grade crossing.

§ 234.106 Partial activation.

Upon receipt of a credible report of a partial activation, a railroad having maintenance responsibility for the warning system shall promptly initiate efforts to warn highway users and railroad employees at the subject crossing in the same manner as required for false activations (§234.107).

§ 234.107 False activation.

Upon receipt of a credible report of a false activation, a railroad having maintenance responsibility for the highway-rail grade crossing warning system shall promptly initiate efforts to warn highway users and railroad employees at the crossing by taking the following actions:

(a) Prior to a train's arrival at the crossing, notify the train crew of the report of false activation and notify any other railroads operating over the crossing;

(b) Notify the law enforcement agency having jurisdiction over the crossing, or railroad police capable of responding and controlling vehicular traffic; and

(c) Provide for alternative means of actively warning highway users of approaching trains, consistent with the following requirements (see Appendix B for a summary chart of alternative means of warning).

(1)(i) If an appropriately equipped flagger is providing warning for each direction of highway traffic, trains may proceed through the crossing at normal speed.

(ii) If at least one uniformed law enforcement officer (including a railroad police officer) provides warning to highway traffic at the crossing, trains may proceed through the crossing at normal speed.

(2) If there is not an appropriately equipped flagger providing warning for each direction of highway traffic, or if there is not at least one uniformed law enforcement officer providing warning, trains with the locomotive or cab car leading, may proceed with caution through the crossing at a speed not exceeding 15 miles per hour. Normal speed may be resumed after the locomotive has passed through the crossing. In the case of a shoving move, a crewmember shall be on the ground to flag the train through the crossing.

(3) In lieu of complying with paragraphs (c) (1) or (2) of this section, a railroad may temporarily take the warning system out of service if the railroad complies with all requirements of §234.105, "Activation failure."

(d) A locomotive's audible warning device shall be activated in accordance with railroad rules regarding the approach to a grade crossing.

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No. 07-1355

IN THE

Supreme Court of the United States

THE VILLAGE OF MUNDELEIN, ILLINOIS,
Petitioner,

v.

WISCONSIN CENTRAL RAILROAD,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Illinois

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a municipal ordinance prescribing th amount of time that trains may block highway-grad crossings is preempted by the Federal Railroa Safety Act (FRSA), codified at 49 U.S.C. § 2010 (2000 & Supp. 2004).

STATEMENT PURSUANT TO RULE 29.6

Respondent Wisconsin Central Ltd. is a wholly owned subsidiary of Wisconsin Central Transportation Corporation, which is a wholly owned subsidiary of Grand Trunk Corporation, which is a wholly owned subsidiary of Canadian National Railway Company, a publicly traded company. No publicly held company owns more than ten percent of the stock of Canadian National Railway Company.

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INTRODUCTION

Respondent Wisconsin Central Ltd. ("Railroad") submits this brief in opposition to the petition for a writ of certiorari filed by the Village of Mundelein, Illinois ("Village").

There is no significant conflict among state and federal courts on the question of whether local laws limiting the time that a train may block a highway-grade crossing are preempted by FRSA. The Village candidly concedes that "few" courts have ever reached the question, see Pet. 19, and only the decision below has addressed the issue since the FRSA preemption provision was amended in late 2007. In any event, all decisions (save one from an intermediate state appellate court) have found such laws preempted, as the Illinois Supreme Court unanimously did here. The Village tries to enhance the alleged conflict by reciting slight differences in various courts' articulation of the test for FRSA preemption, but such differences in phraseology are of no moment where, as here, courts routinely find a particular type of regulation preempted under a federal statute.

Preemption in this case also follows inexorably from this Court's decisions addressing FRSA preemption and comports with Congress's desire to avoid a patchwork system of railroad-safety regulation and enforcement across the country. Local regulation is particularly inappropriate in this setting. Railroads have no economic or other incentive to block rail crossings. To the contrary, they have strong incentives to keep rail traffic moving except, as here, where necessary for safety reasons. The Village's attempt to punish the Railroad for failing to move quickly to resolve a safety

concern presents no issue warranting this Court's review.

COUNTER STATEMENT OF THE CASE

1. The following account of the underlying facts is undisputed. On the morning of January 17, 2005, respondent Wisconsin Central Ltd.'s train #A442 stopped for a crew change on its way from Fond du Lac, Wisconsin to Schiller Park, Illinois. Pet. App. 2a. Conductor Bernard Kareka and an engineer assumed control of the train in Lake Villa, Illinois. *Id.* The two men learned from a note left by the previous crew that the train had experienced problems with its air brakes, but believed that the brakes had been repaired. *Id.* 3a. They nonetheless conducted tests of the air-brake system, including a "set and release test," to ensure that the air pressure in the system complied with governing federal regulations. *Id.* As a crew taking over a train already en route, the men were not required to, and did not, perform a complete visual inspection of the train or a full battery of tests. *Id.*

As the train moved south, an alarm known as a "hot box detector" alerted the crew that the rear car of the train had equipment dragging from it. Pet. App. 3a-4a. The engineer then began to reduce the train's speed. *Id.* 4a. But when he did so, the brake pressure plummeted, activating the emergency braking system and bringing the train to a rapid stop. *Id.* Kareka discovered two brake-related problems during an ensuing visual inspection: a damaged angle cock and a broken drawbar at the end of one car. *Id.* The latter problem had caused the rear section of the train to separate from the forward portion. *Id.*

In response, the crew placed the car with the broken drawbar on another track, left the separated

rear portion at a location where it would not block a grade crossing, and then reversed the train in order to reconnect the front and rear portions of it. Pet. App. 5a. The crew at that point retested the brakes and, after restoring the air pressure to the level required by federal regulations, moved the train to a location where they could remove the rear car that had activated the hot box detector in the first place. *Id.*

It was during the stop at this location that the train obstructed the Hawley Street crossing in the Village of Mundelein. Pet. App. 5a. Kareka was able on two occasions to separate train cars so that passengers disembarking from a commuter train could reach the nearby parking lot. *Id.* But the crew, which was obliged under federal law to perform another air pressure test on the brake system, was unable to restore the system to the requisite levels for the rear portion of the train. *Id.* Respondent's dispatcher eventually ordered the crew to proceed to Schiller Park with the front portion of the train, leaving the rear portion to be taken there by another train. *Id.* 6a. The train obstructed the Hawley Street crossing for a total of 157 minutes. *Id.*

2. The Village issued the Railroad a citation for violating its Ordinance 89-4-12 § 1(A) (1989), which bars rail carriers from "obstruct[ing] public travel at a railroad-highway grade crossing for a period in excess of 10 minutes," except where the train in question "is continuously moving or cannot be moved by reason of circumstances over which the rail carrier has no reasonable control." Pet. 3-4.[1] (quoting 625 Ill. Comp. Stat. 5/18c07402(1)(b) (West 2004)).

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[1] As the courts below explained, the Village has adopted as its own laws the pertinent provisions of the Illinois Motor Vehicle

A bench trial was conducted on the Railroad's two main defenses to the citation: that the blockage of the Hawley Street crossing was due to circumstances beyond the Railroad's control and that, under the facts of this case, enforcement of the Village ordinance was preempted under FRSA. Pet. App. 55a-56a. The trial court rejected both defenses, upholding the citation and the accompanying $14,000 fine. *Id.* 56a.

3. The Railroad renewed its two defenses on appeal. Its principal argument was that FRSA's preemption clause bars enforcement of the ordinance under the facts and circumstances presented. Br. of Defendant-Appellant at 2, 3, 13, 14, 19, 24, *Vill. of Mundelein v. Wis. Cent. R.R.*, 855 N.E.2d 230 (No. 2-05-0492) (Ill. App. Ct. 2006).

The Appellate Court of Illinois held the ordinance preempted and thus unenforceable not only in the circumstances presented, but in all circumstances. Pet. App. 45a. Applying the analytical framework established by this Court in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1993), the appellate court concluded that the ordinance fell within FRSA's express preemption clause because the ordinance "'relate[d] to' railroad safety" and because federal regulations on train speed and train length "covered" the same subject matter as the ordinance. Pet. App. 33a-44a. The Village's ordinance was not preserved by the savings clause, the court also found, because that clause applies by its terms only to laws, regulations, and orders issued by "[a] State." *Id.* 47a-49a.

Code, including the state blocked-crossing statute. *See* Pet. App. 10a, 36a (citing Mundelein Municipal Code § 10.20.010 (1989)).

4. The Illinois Supreme Court granted the Village's petition for review and unanimously affirmed. The state supreme court followed the framework set forth in *Easterwood* and this Court's subsequent decision in *Norfolk Southern Railway v. Shanklin*, 529 U.S. 344 (2000). The court first found that the ordinance related to railroad safety and thus fell "within the scope" of FRSA's preemption clause. Pet. App. 11a. Examining the "context and plain language of the ordinance," the court next determined that federal regulations on train speed, air-brake testing, and grade-crossing safety "substantially subsume the subject" matter of the local ordinance, which the court interpreted as "the movement of trains at grade crossings." *Id.* 14a-17a. The court explained that inferring preemption from more than just a single regulation was consistent with *Easterwood*, where this Court had found preemption on the basis of a set of related regulations and the structure of the regulatory scheme. *Id.* 16a-17a (citing *Easterwood*, 507 U.S. at 674, and *Burlington N. & Santa Fe Ry. v. Doyle*, 186 F.3d 790, 795 (7th Cir. 1999)).

Finally, the Illinois Supreme Court rejected the argument that the ordinance could be preserved by FRSA's savings clause. That clause saves only state laws that are directed at a specifically local safety hazard, that are compatible with federal law, and that do not burden interstate commerce unreasonably. 49 U.S.C. § 20106. The court declined to pass, as the appellate court had done, on the question of whether the savings clause applies to municipal laws, noting "considerable uncertainty" on that point. Pet. App. 21a. But the court affirmed on the alternative grounds that the ordinance was incompatible with the federal regulations governing train speed and air-brake testing and, because it had

the effect of regulating the length of trains, violated the Commerce Clause under *Southern Pacific Co. v. Arizona*, 325 U.S. 761, 775 (1945). Pet. App. 21a-24a.

REASONS FOR DENYING THE PETITION

The unanimous decision of the Illinois Supreme Court does not warrant this Court's review. That decision faithfully and correctly applied this Court's FRSA preemption precedents. The decision accords, moreover, with an all but unanimous body of federal and state decisional authority finding local laws regulating the amount of time a train can block a highway-grade crossing are preempted under FRSA. Neither a lone intermediate state appellate decision to the contrary nor slight variations in the way courts phrase the FRSA preemption test creates any reason for further review. The safety concerns raised by the Village and its *amici* are exaggerated and in any event inadequate by themselves to justify certiorari.

I. THE ILLINOIS SUPREME COURT'S UNANIMOUS DECISION PRESENTS NO CONFLICT WORTHY OF REVIEW.

A. The Decision Below Is Consistent With This Court's Precedents.

The Village's principal argument is that the ruling of the Illinois Supreme Court "conflicts [with] this Court's preemption teachings." Pet. 14. According to the Village, this Court's decisions in *Easterwood* and *Shanklin* required the Illinois Supreme Court to conduct a case-specific and "in-depth analysis" of the statutory term "railroad safety," and "impliedly recognized that the FRSA only applies to state and local government laws designed to improve railroad safety." Pet. 15. The Village also insists that the *Easterwood* Court's construction of the term

"covering" requires some heightened form of specificity that cannot be achieved by a set of federal regulations that together govern the particular subject matter. *Id.* 17.

The Village misreads *Easterwood*. As an initial matter, this Court did not insist upon "in-depth analysis" of the term "railroad safety" in every preemption case. Pet. 15. The Court instead recognized that the phrase "relating to railroad safety" is sweeping and concluded in just one sentence that "[l]egal duties imposed on railroads by the common law fall within the scope" of that capacious phrase. 507 U.S. at 664 (citing *Morales v. Trans World Airlines*, 504 U.S. 374, 383-84 (1992), for the proposition that a "statute's use of 'relating to' confers broad pre-emptive effect").

There was also no "recogni[tion]" in *Easterwood*, either explicit or implicit, that FRSA's preemption provision applies only to state and municipal laws that are intentionally "designed to improve railroad safety." Pet. 15. This Court placed no such gloss on the statute in the ten-page span of the opinion that the Village cites. *Id.* Indeed, the Court addressed the issue of regulatory purpose only in *rejecting* the argument that the purpose underlying federal regulations figures into the preemption analysis at all. *See Easterwood*, 507 U.S. at 675 (FRSA's preemption clause "does not . . . call for an inquiry into the Secretary's purposes, but instead directs the courts to determine whether regulations have been adopted that in fact cover the subject matter of train speed"). The *Easterwood* Court's refusal to be guided by a regulation's professed purpose, as the Illinois Supreme Court pointed out, placed *Easterwood* in line with the Court's preemption precedents outside of the FRSA context, which likewise examine "the

effects of the [state] law," not its purpose. *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 105 (1992); *see* Pet. App. 15a.

Nor does *Easterwood* support the cramped reading of the term "covering" that the Village urges. To be sure, the Court has interpreted this statutory term as requiring the proponent of preemption to "establish more than that [the federal regulations] 'touch upon' or 'relate to' th[e] subject matter"; the party must show that "the federal regulations substantially subsume the subject matter of the relevant state law." *Easterwood*, 507 U.S. at 664. But the *Easterwood* Court did not, as the Village suggests, mandate a reading of federal regulations so "narrow" as to limit preemption to those instances where there is a single, on-point federal regulation. Pet. 17. The Court did just the opposite -- it looked beyond the "face" of the federal regulations at issue (which set maximum speed limits depending on the type of train track) and examined both "related safety regulations" and "the overall structure of the regulations" in finding preemption. 507 U.S. at 674.

The Illinois Supreme Court applied each step of the analysis required under *Easterwood* and reached a result fully consistent with that decision. The state court first asked whether the ordinance qualified as a law "relating to" railroad safety. Pet. App. 11a; *Easterwood*, 507 U.S. at 664. The court concluded that the ordinance, which appeared under the heading "Safety Requirements for Railroad Operations,"[2] satisfied the phrase "relating to" as construed by this Court. Pet. App. 11a. The state

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[2] The quoted heading is the one in the Illinois Motor Vehicle Code, the provisions of which the Village has adopted as its own. *See supra* at 4 n.1.

court then carefully defined the "subject matter" of the ordinance as "the movement of trains through grade crossings." *Id.* 14a. Applying the *Easterwood* Court's reading of the statutory term "covering," the state court held that federal regulations "substantially subsume" that subject matter. *Id.* 15a. The court reached this conclusion after considering, as had this Court in *Easterwood*, not just a single federal regulation, but "related safety regulations and the overall structure of the regulations." *Id.* 16a (citing *Easterwood*, 507 U.S. at 674, and *Burlington N. & Santa Fe Ry.*, 186 F.3d at 795). Again as in *Easterwood*, the Village could not avoid that result simply by arguing that its law and the federal regulations were directed at different objectives, for the preemption inquiry turned on the effect of the laws, not their professed purposes. Pet. App. 14a-15a; *see Easterwood*, 507 U.S. at 675. Simply put, *Easterwood* and the ruling below are in complete harmony.

The Village's reliance on two conflict-preemption cases is similarly misplaced. In both *Rice v. Norman Williams Co.*, 458 U.S. 654, 659 (1982), and *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 130-31 (1978), this Court answered the distinct question of whether, in the absence of an express statutory provision, there was "an irreconcilable conflict between the federal and state regulatory schemes" sufficient to warrant preemption of the latter. *Rice*, 458 U.S. at 659. Here, by contrast, the state court held that the ordinance fell within the scope of FRSA's *express* preemption clause, and assessed the ordinance's compatibility with federal regulations only to decide whether the ordinance qualified for the "narrow exception to preemption" carved out by the savings clause. *See Duluth, Winnipeg & Pac. Ry. v.*

City of Orr, — F.3d — , 2008 WL 2467924, at *1 (8th Cir. June 20, 2008).[3] The Village bore the burden of showing that the savings clause applied, *id.* at *2, and the Illinois Supreme Court's correct conclusion that the Village had not carried its burden does not warrant review by this Court.

B. There Is No Conflict Among The Lower Courts In Need Of This Court's Resolution.

The Village urges certiorari to resolve a purely fanciful conflict among state and federal courts. That effort too misses the mark.

As the Illinois Supreme Court explained, its ruling accords with the overwhelming weight of federal and state decisional authority. Pet. App. 17a-18a. Two separate panels of the Sixth Circuit, no fewer than three federal district courts, and the highest courts of Pennsylvania and Washington have all concluded – the appellate courts without a single dissent – that state and local laws limiting the time that trains may block grade crossings are preempted under FRSA. *See CSX Transp., Inc. v. City of Plymouth*, 283 F.3d 812, 817 (6th Cir. 2002); *CSX Transp., Inc. v. City of*

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[3] It is noteworthy that the Village points to no conflict among the lower courts with respect to the third question presented in the petition. But this case is at all events a poor vehicle for reviewing that question because the Illinois Supreme Court's application of the savings clause can be affirmed on any number of grounds. That court did not even reach the sound basis on which the Appellate Court of Illinois had deemed the clause inapplicable – that the savings clause applies only to state laws, not municipal ones. Pet. App. 49a; *see also CSX Transp., Inc. v. City of Plymouth*, 86 F.3d 626, 628 (6th Cir. 1996). This and other compelling alternative grounds for affirmance counsel strongly against granting review on this question. *See The Monrosa v. Carbon Black Exp., Inc.*, 359 U.S. 180, 183 (1959).

Plymouth, 86 F.3d 626, 630 (6th Cir. 1996); *Lewis v. Norfolk S. Ry.*, No. 06-2724, 2008 U.S. Dist. LEXIS 46247, at *26 (W.D. Tenn. June 11, 2008); *CSX Transp., Inc. v. City of Mitchell*, 105 F. Supp. 2d 949, 952 (S.D. Ind. 1999); *Rotter v. Union Pac. R.R.*, 4 F. Supp. 2d 872, 874 (E.D. Mo. 1998); *Krentz v. Consol. Rail Corp.*, 910 A.2d 20, 35-36 (Pa. 2006); *City of Seattle v. Burlington N. R.R.*, 41 P.3d 1169, 1174-75 (Wash. 2002) (en banc); *see also Friberg v. Kansas City S. Ry.*, 267 F.3d 439, 443-44 (5th Cir. 2001) (holding that a state statute regulating the blockage of grade crossings was preempted by the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501).

There is, as the Illinois Supreme Court acknowledged, one reported ruling to the contrary. In *State v. Wheeling & Lake Erie Railway*, 743 N.E.2d 513, 514 (Ohio Ct. App. 2000), an Ohio intermediate appellate court rejected a preemption challenge to a state statute that barred trains from blocking a crossing for more than five minutes. The sum total of the court's reasoning was that no federal regulation specifically governed "the length of time a stopped train can block a roadway." *Id.* at 514-15. Beyond that, the court based its ruling on an unpublished Ohio decision that had, prior to this Court's decision in *Easterwood*, rebuffed a *conflict* preemption challenge to the state statute in equally conclusory fashion. *Id.* (citing *State v. Chessie Sys. R.R.*, No. 2494, 1990 WL 1209 (Ohio Ct. App. Jan. 3, 1990)). This is not the stuff of certiorari. *See* Sup. Ct. Rule 10(b) (review may be warranted when

conflict involves decision by "a state court of last resort").[4]

The Village makes much of this alleged division of authority, Pet. 19-20, but concedes at the same time that "[t]here are few decisions examining blocked grade crossing laws." *Id.* 19. Even fewer courts – just the cases cited above – have answered the specific question of whether laws prescribing the amount of time trains may block grade crossings are preempted under FRSA. The upshot is that the question presented here is not a "recurring" one of great "importan[ce]," *id.*, but one that arises infrequently and has been treated with striking uniformity by federal and state courts.[5]

Nor can the Village leverage into a substantial conflict some trivial differences in the way courts

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[4] *In re Miamisburg Train Derailment Litig.*, 626 N.E.2d 85 (Ohio 1994), does not suggest that the Ohio Supreme Court would deviate from the federal and state decisional authority that soundly guided the Illinois appellate courts here. Pet. 22. The Ohio Supreme Court agreed in that case that the federal regulations at issue would bar the state from enacting laws or regulations, but drew a narrow "distinction between state regulation and common-law tort claims in this circumstance." 626 N.E.2d at 93. That decision has not been extended beyond the context of common-law torts, and except for the flawed *Wheeling* decision has not been applied to a blocked-grade-crossing law.

[5] Congress recently amended FRSA's preemption provision, 49 U.S.C. § 20106, and modified the standards for preemption. *See* Pub. L. No. 110-53, Title XV, § 1528, 121 Stat. 266, 453 (2007) (adding to 49 U.S.C. § 20106 a subsection "clarif[ying]" which state law causes of action for "personal injury, death, or property damage" Congress intended to preempt). That change does not affect this case, but it means that the Court will not be interpreting the language of the statute now in effect if it were to grant certiorari – which is reason enough to deny review.

have articulated the standard for FRSA preemption. Pet. 20-22 (citing *United Transp. Union v. Foster*, 205 F.3d 851, 860 (5th Cir. 2000), *Rushing v. Kansas City S. Ry.*, 185 F.3d 496 (5th Cir. 1999), *S. Pac. Transp. Co. v. Pub. Util. Comm'n*, 9 F.3d 807 (9th Cir. 1993)). According to the Village, these preemption decisions involving laws about train whistles "*narrowly* construe[d] federal regulations," whereas the Illinois Supreme Court construed the federal regulations in this case broadly. *See* Pet. 20. For starters, any variation between the precise phraseology employed by the Illinois Supreme Court and that used in the cited cases does not provide a basis for certiorari. This Court "reviews judgments, not statements in opinions," and certainly not the manner in which the lower courts recite a settled legal framework. *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1003 n.5 (1994); *California v. Rooney*, 483 U.S. 307, 311 (1987) (per curiam).

Moreover, the opinions themselves make clear that these courts in fact applied the same fundamental approach as the Illinois Supreme Court. The Fifth and Ninth Circuits, like the court below, focused on the specific "subject matter" of the state regulations under review and asked whether the competing federal regulations "substantially subsume" that subject matter. *Compare* Pet. App. 15a-17a, *with Foster*, 205 F.3d at 860, 862, *and S. Pac. Transp. Co.*, 9 F.3d at 813. That the courts reached differing results is easily explained by the simple (and unexceptional) fact that the federal and state regulations at issue in the train-whistle cases were different in character and scope from those under review in the decision below. Indeed, while rejecting a preemption challenge to a state regulation on *when* the whistle must be sounded, the same Fifth Circuit

panel that supposedly construed federal regulations so "narrowly" held that FRSA preempted another section of the state statute regulating *what type* of whistle or horn trains must use. *Foster*, 205 F.3d at 861. A set of court rulings recognizing that FRSA preempts some state enactments but not others plainly does not warrant this Court's attention.

II. THE POLICY CONCERNS PRESENTED BY THE VILLAGE AND ITS *AMICI* PROVIDE NO BASIS FOR CERTIORARI.

The Village and its *amici* attempt to overcome the absence of an issue on which courts have disagreed by casting the Illinois Supreme Court as having definitively resolved a question of vast national importance and created a "regulatory void[]" that threatens public safety. Pet. 24; Br. of Am. Curiae 9. Their claim in this regard is predicated on incomplete information, is overstated, and provides no basis for certiorari.

As an initial matter, the Village misleadingly quotes the Federal Railroad Administration's ("FRA") statement that it "does not regulate the length of time a train may block a grade crossing." FRA, *Trains Blocking Highway-Rail Grade Crossings: Fact Sheet* (May 2008), *available at* http://www.fra.dot.gov/downloads/PubAffairs/FRA_Blocked_Highway_Rail_Grade_Crossing_Fact_Sheet.pdf. The FRA explains in the very next sentence that any rule imposing limits on "the amount of time a grade crossing may be blocked could have the undesirable effect of causing a railroad to violate other federal safety rules[,] such as when a train must be stopped in order to comply with regulations requiring that air brake tests be performed." *Id.* Of course, this was part of the reasoning that caused the Illinois

Supreme Court to find that the Village ordinance is preempted under FRSA. Pet. App. 17a.

There is likewise no merit to *amici*'s contention that the decision below produces "a bizarre result" at odds with Congressional intent. Br. of Am. Curiae 9. *Amici* suggest that Congress could not have intended to bar municipal regulation of the narrow area at issue absent a specific federal regulation on point. *Id.* What would be truly "bizarre," however, would be for Congress to prioritize national uniformity in one breath and then to sanction in the next a system under which trains traveling in interstate commerce are subject to a vast array of blocked-grade-crossing laws that vary not just from state to state, but from town to town. *See, e.g.*, Wis. Stat. § 192.292 (imposing ten-minute limit, except "outside of cities").[6] Indeed, Congress considered and explicitly rejected a patchwork system of state and local regulation and enforcement of the sort contemplated by *amici*. *See* H.R. Rep. No. 91-1194 (1970), *reprinted in* 1970 U.S.C.C.A.N. 4104, 4109 ("The Committee does not believe that safety in the nation's railroads would be advanced sufficiently by subjecting the national rail system to a variety of enforcement in 50 different judicial and administrative systems."). Section 20106 and its predecessors thus asserted broad federal power while preserving an important yet greatly circumscribed role for local regulations to

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[6] It would be a regime where, for example, a train crossing the Louisiana/Mississippi border from west to east would see the time during which it could lawfully block a grade crossing drop from 20 minutes to five – or whatever other limit a particular Mississippi city, town, or village decided to impose. *See* La. Rev. Stat. Ann. § 48:391; Miss. Code Ann. § 77-9-235. *That* regime would indeed be "bizarre" and flatly at odds with Congress's goal of safety through national uniformity.

address genuinely local concerns. *See CSX Transp., Inc. v. Williams*, 406 F.3d 667, 672 (D.C. Cir. 2005) (per curiam); *Nat'l Ass'n of Regulatory Util. Comm'rs v. Coleman*, 542 F.2d 11, 14-15 (3d Cir. 1976). There is no room in that scheme for the Village's ordinance.

Finally, the widespread threat to public safety that the Village perceives defies both common sense and the economic realities of the industry. The Village and its *amici* paint a grim picture of the harm to children and the infirm they say is likely to result from crossings supposedly subject to obstruction simply because a train operator stops to "admire the scenery." Pet. 24. This case, it should go without saying, involves nothing of the sort; it does not implicate diverted emergency vehicles, children crawling over train tracks to reach a bus stop, or a delinquent train conductor pausing for hours on end "to have a smoke." *See id.* 20; Br. of *Amici Curiae* 6-8. The unfortunate delay here instead arose from the rare situation in which a railroad has an interest in blocking a grade crossing – where safety concerns require immediate attention before the train can be moved. But railroads normally have every economic incentive to keep their trains in motion. This Court does not lightly presume that companies act in an irrational manner directly contrary to their economic self-interest, *cf. Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-89 (1986), and the Village and its *amici* have offered nothing to justify making such an unwarranted leap here.

Government regulation is not needed to ensure that a railroad will do all that it can to avoid and minimize blocking a grade crossing. What local regulation will do is create conflicting obligations on railroad employees to balance federal safety commands and local timing demands. This is

precisely what the express preemption provision in FRSA was intended to avoid. If the Village and other communities believe that the hazards posed by temporarily blocked grade crossings are grave, they should make the case to Congress and the Department of Transportation, not to this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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THE VILLAGE OF MUNDELEIN, ILLINOIS,
Petitioner,

v.

WISCONSIN CENTRAL RAILROAD,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY MEMORANDUM

As Wisconsin Central Railroad notes, the trial court found that the blocking of the grade crossing at issue in this case was within the railroad's control. Opp. at 4. Neither the Illinois Supreme Court, nor the Appellate Court of Illinois, disturbed this ruling. Instead, both courts found that the Village's ordinance was preempted in *all circumstances* by the express provisions of federal law because the Village's ordinance and the federal regulations "cover the same subject matter." Pet. App. at 17a, 45a.

State and federal regulations "cover the same subject matter" when they address *the same* safety concerns. *Burlington Northern R.R. v. State of Mont.*, 880 F.2d 1104, 1106 (9th Cir. 1989); (emphasis added); *see also Southern Pacific Transp. Co. v. Public Utilities Comm. of California,* 647 F. Supp. 1220, 1225 (N.D. Cal.1986), *aff'd,*820 F.2d 1111 (9th Cir. 1987) (per curiam), *Burlington Northern and Santa Fe Ry. Co. v. Doyle*, 186 F.3d 790, 796 (7th Cir. 1999). The safety concerns addressed by the federal and state regulations in this case are not the same. In its brief, Wisconsin Central Railroad asserts that the Illinois Supreme Court correctly applied this Court's decision in *CSX Transportation, Inc. v. Easterwood*, 507 U.S. 658 (1992) when it held that the Secretary of Transportation had issued regulations on the same safety concerns as the Village's ordinance. Wisconsin Central Railroad reads *Easterwood* too broadly.

In *Easterwood*, the complaint alleged that the train was traveling too quickly under the given circumstances. *Easterwood*, 507 U.S. at 675 n15. To

determine whether federal maximum speed limit regulations preempted tort claims based on excessive speed, this Court examined regulations dealing with grade crossings warning devices and determined that the regulations setting forth warning device requirements were enacted with an eye towards safety concerns based on train speed. *Easterwood* at 674. As such, the Court determined that maximum speed limits regulations "covered" tort claims based on excessive speed because the regulations together addressed safety concerns related to train speed. This Court's interpretation of what the regulations "covered" was quite narrow.

In contrast, the Illinois Supreme Court cobbled together regulations to create a broad interpretation that federal regulations governed "train movement," and on that basis preempted traditional local government health and safety regulation requiring that grade crossings be cleared, when possible, to accommodate the free flow of traffic. While determining the safety concerns at which a federal requirement is aimed may require some level of generalization, too much generalization results in meaningless analysis. With too much generalization, federal regulations become all encompassing. *See Doyle*, 186 F.3d at 796. To assert that the regulations dealing with brake testing, speed, and grade signal systems regulate "train movement," is an example of a court engaging in too much generalization.

Wisconsin Central Railroad's opposition errs in two other respects. First, the opposition suggests that due to recent amendments to the FRSA this case is not appropriate for review. Opp. at 12 n5. However, as

Wisconsin Central Railroad itself notes, the amendment does not affect this case. In fact, the statutory language at issue in this case has not changed at all and the Court would be interpreting the current language of the statute.

Second, Wisconsin Central Railroad is incorrect that there are other alternative grounds for affirming the Illinois Supreme Court. Opp. at n.3. It is critical to remember that the FRSA savings clause would only be reached if this Court determined that federal regulations covered the same subject matter as the Villages ordinance. If that point is reached, the Village explained that the Illinois Supreme Court erred when it determined that the ordinance violates the Commerce Clause and its holding on this point is in conflict with *Commonwealth v. New York Central Railroad Co.*, 216 N.E.2d 870 (Mass. 1966). And, while the Illinois Supreme Court did not reach the issue of whether the Village is entitled to regulate under the FRSA, this Court has previously held that the term "State" in federal statutes encompasses local governments. *See, Columbus v. Ours Garage & Wrecker Service, Inc.*, 536 U.S. 424 (2002); *Wisconsin Pub. Intervenor v. Mortier*, 501 U.S. 597 (1991).

The majority of states have laws prohibiting the blocking of grade crossings beyond a certain amount of time, if it is within the control of the railroad to move along. Children should not to have to crawl over or under trains on a regular basis to get to school, yet they do. Public safety personnel should not to be forced to find alternate routes, if available at all, to respond to emergency calls, yet they must. The commercial and general life activities of whole towns should not to

come to a standstill as trains block crossings when they have reasonable control to move through the crossings, yet that is the case. Federal law should not aid in the creation of these situations.

Federal law should not preempt traditional local authority to regulate thoroughfares for the purpose of protecting local health and safety on the basis of generalities, when this Court's precedents require that express preemption be applied narrowly.

The Village of Mundelein respectfully requests that its petition be granted.

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VILLAGE OF MUNDELEIN, ILLINOIS,
Petitioner,

v.

WISCONSIN CENTRAL RAILROAD,
Respondent.

On Petition for Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICI CURIAE*, THE CITY OF GARLAND, TEXAS; THE ILLINOIS MUNICIPAL LEAGUE; THE INDIANA ASSOCIATION OF CITIES AND TOWNS; THE LEAGUE OF MINNESOTA CITIES; THE TEXAS MUNICIPAL LEAGUE, AND THE TEXAS CITY ATTORNEYS ASSOCIATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The City of Garland, Texas, the Illinois Municipal League, the Indiana Association of Cities and Towns, the League of Minnesota Cities, the Texas Municipal League, and the Texas City Attorneys Association, as *amici curiae*, file this brief in support of the Petitioners, the Village of Mundelein, Illinois.[1]

The City of Garland, Texas, is a home-rule municipality located in Dallas County, Texas. In the late 1800s, the two towns that eventually grew into the City of Garland were established at the cross-roads of two major railway lines. As a result, the City of Garland is virtually bisected north-south, and east-west by two active railways, each of which are crossed at grade level by dozens of major streets and highways. Any ruling on the reach of the preemptive effects of 49 U.S.C. §20101 *et seq.* (2000) will necessarily impact the City not only as to its railroad-highway grade crossings, but in other as yet unanticipated areas that cities have traditionally regulated.

The Illinois Municipal League (IML) is a non-profit, non-political association of 1,134 cities, villages, and

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[1] Pursuant to this Court's Rule 37.2(a), letters of consent from all parties regarding the filing of this brief have been filed with the Clerk. Pursuant to this Court's Rule 37.6, *amici curiae* represent that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief. Pursuant to Supreme Court Rule 37.2(a), notice of intent to file this brief was given to counsel for all parties.

incorporated towns recognized by statute as the instrumentality of its members. 65 ILCS 5/1-8-1. The purpose and goal of the IML is to articulate, defend, maintain, and promote the interests and concerns of Illinois municipalities. Nearly all of Illinois 1,298 municipalities has a highway grade railroad crossing affected by this case. There are 13,115 highway grade railroad crossings (8,432 are public, and 4,683 are private) throughout the State of Illinois, making IML's interest in this case especially strong. (Source: Illinois Commerce Commission website and interactive map at http://www.icc.illinois.gov/rr/crossingmap.aspx, reviewed December 20, 2006).

The Indiana Association of Cities and Towns (IACT) is a voluntary association of cities and towns established in 1891 to provide Indiana municipal officials a means to congregate, educate and advocate their interests before the state and federal governments. In 2007, IACT's membership consisted of 451 of the total 567 cities and towns in the state of Indiana. As a statewide organization, IACT serves as an information clearinghouse on taxation, budgets, municipal and other transportation issues, capital financing, and related topics and annexation and is uniquely well-suited to bring matters contained in this brief to the Court's attention Any ruling on the preemptive effects of 49 U.S.C. §20101 et seq. will directly impact railroad-highway grade crossings in these cities and towns. IACT has frequently been granted amicus curiae status in the past in Indiana state courts and federal courts.

The League of Minnesota Cities (LMC) has a voluntary membership of 830 out of 854 cities in

Minnesota. LMC represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, advocacy, and insurance services. LMC has a public interest in this appeal as a representative of Minnesota cities with railroad-grade crossings on public highways and streets.

The Texas Municipal League (TML) is a non-profit association of over 1,080 incorporated cities that provides legislative, legal, and educational services to its members. The Texas City Attorneys Association (TCAA), an affiliate of TML, is an organization of more than 400 attorneys who represent Texas cities and city officials in the performance of their duties. The interests of TML and TCAA are the same with regard to the matters now before this Court: the importance of local governments to provide for safe and convenient travel over municipal thorough-fares.

Amici curiae's specific interest in this case lies in the impact that this Court's ruling will have on local governments throughout the United States. Of all the various sorts of transportation that may fall within the ambit of interstate commerce, none is as intrusive and dangerous as stopped trains blocking railroad-highway grade crossings.

SUMMARY OF THE ARGUMENT

Highway-grade crossings blocked by stopped trains cause havoc with local traffic patterns, impacting citizens' daily lives and business routines. In addition to inconveniencing citizens, trains stopped on

highway-grade crossings create dangerous situations for thousands of children and first responders and the people they are trying to assist everyday.

ARGUMENT

The train that blocked the streets of Mundelein consisted of 119 railcars and three locomotives. A train that size may stretch nearly three-quarters of a mile. Depending on the layout of a city's streets, a train that size, stopped for over *two and a half hours*, will virtually shut down a city for the duration. The mischief created by a railway in that manner is easy to imagine. Stopped trains can cripple a city's ability to provide emergency medical care and police protection to those of its citizens unfortunate to be located on the wrong side of the tracks, as it were. Vehicles caught at the crossing are literally trapped, and the resulting mayhem due to disrupted traffic flows lends itself to even greater dangers (for which emergency care may be unavailable) in the way of accidents as frustrated drivers attempt to maneuver around the blockage and resultant traffic jams. Stopped trains are a dangerous and attractive nuisance for pedestrians and children. Schools, banks, hospitals, and all kinds of commerce are brought to a grinding halt when railcars stop on grade crossings throughout cities and towns all over America, and particularly in the Midwest and western states.

The problem of blocked crossings is so real and universal that nearly 30 states and hundreds of cities have enacted laws prohibiting blocked crossings. The railways, however, want to play their preemption trump card, claiming that some Federal regulations

that sort of apply (in a square peg and round hole manner) means that no State, no city may tell the railways how long is too long to block a crossing. Yet, inasmuch as the railways have failed to identify even one Federal regulation that directly applies to how long a train may block public streets, if state and local laws are indeed preempted, there is absolutely nothing that prevents a railway from blocking a grade crossing with impunity, whenever, wherever, and indeed forever.

The concerns faced by cities, towns and villages today were not considered as problematic before the introduction of the automobile in the early 1900's.

> Initially, safety at highway-rail grade crossings was not considered a problem. Trains were few in number and slow, as were highway travelers who were usually on foot, horseback, horse-drawn vehicles, or cycles. By the end of the century, crossing collisions were increasing and communities became concerned about safety and delays at crossings. Many states, cities, and towns adopted laws, ordinances, and regulations that required the railroads to eliminate some crossings and provide safety improvements at others.[2]

A grid method of street placement was typically used as cities developed, as in Garland, Texas. As a

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[2] Railroad-Highway Grade Crossing Handbook - Revised Second Edition August 2007, Federal Highway Administration, available at *http://safety.fhwa.dot.gov/xings/07010/sec01.htm*

result, cities and towns across the country can be divided by stopped railroad cars in both a north-south directions and east-west directions. The number of highway-grade crossings is staggering.

> A crossing over the railroad was often provided for every street, resulting in about 10 crossings per mile. In 2005, there were 248,273 total intersections of vehicular and pedestrian traveled ways with railroads. This equates to approximately 2.4 crossings per railroad line mile.[3]

In 2005, there were 147,805 grade level crossings in the United States. Of these, sixty-one percent, or 90,274, of public at-grade crossings were located in rural areas, compared to 57,531 in urban areas. The majority of crossings are located on local roads, requiring local governments to bear the unique impacts of stopped railcars on local roads with at-grade crossings. The impediment of stopped railcars not only impedes the flow of traffic, but also results in longer public safety response times and other dangerous and deadly consequences.

A review of news articles shows how dramatically trains blocking grade-crossings imperils lives in ways that have nothing to do with "rail safety." For instance, in Huron and Ottowa Counties, Ohio, school children crawl under and over trains to reach their

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[3] *Id.*

schools or homes.[4] "In Sandusky, children have crawled under stopped trains that were blocking streets, said City Manager Gerald Lechner." While Sandusky was able to work with the railroad in that instance to resolve the problem, Sandusky's school children are not the only ones at risk.

Children in Henry County, Ohio face similar problems:

> "[T]here have been many times when trains have been stopped in town before and after school hours, at least preventing some students from getting to classes on time. So they aren't late, 'Kids crawl under them,' Hatfield said. 'How many lives are we going to have to lose before something is done?'"[5]

The lives of children in a south Nashville, Tennessee neighborhood are similarly at risk.

> Helen Stalons, who's lived in the neighborhood for 39 years, says that she sees children crawl under or over the trains "at least once a week" to catch the school bus. The bus stop is on the

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[4] See *Towns Trapped by Trains*, Chesapeake and Ohio Historical Magazine, Dec. 1999 (available at *http://findarticles.com/p/articles/mi_qa3943/is_199912/ai_n8859765*, last visited May 28, 2008).

[5] *Task Force In Henry County Tracks Hazardous Crossings*, Cresent News, Feb. 25, 2001, (available at *http://www.angelsontrack.org/cn022501.html*. last visited May 28, 2008).

other side of the tracks, and if the kids don't want to miss their ride, they have little choice.

"Some'll go under the train, and some'll crawl over," she says of the children who must risk their lives to get to school.[6]

School children are not the only ones at risk when trains block grade crossings. EMT, paramedic, and fire departments are routinely kept from providing services by blocked grade crossings. In one case an elderly man who takes heart and respiratory medication on a regular schedule was blocked from getting to his medication by a train sitting on the tracks.

Fischer says that while waiting, he started to hyperventilate. "I was about to pass out, but I managed to call 911."

Metro police and EMS workers arrived with sirens blaring. It became clear to them that Fischer would need his meds, and soon. He says that the Metro officials called CSX but to no avail. The train didn't budge.

"I had to give my keys to [an EMT], and he had to climb over the train," Fischer says. The EMT had to "walk to my house, find the meds and

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[6] *A Neighborhood Railroaded,* Nashville Scene, Nov. 17, 2007, (available at *http://www.nashvillescene.com/Stories/News/2007/11/15/A_Neighborhood_Railroaded/*, last visited May 28, 2009).

> bring them back to me.... The train was still there when he got back. He had to climb over the train again to get back to me."[7]

In La Salle, Colorado, a blocked crossing prevented police from effectively responding to a bank robbery in progress, while La Salle firefighters have crawled under railroad cars blocking intersection to provide medical care to an individual on the other side of the train.[8] These are not isolated incidents, but are sadly routine for communities and citizens throughout the United States.

Congress could not have intended such a bizarre result when it enacted the Federal Railroad Safety Authorization Act. The ordinance at issue in this case, and the dozens of state and local laws like it are there for a reason. Until the Federal authorities promulgate a clearly applicable regulation governing how long a railway may block highway crossings, without ordinances of the sort the Village of Mundelein has in effect, nothing will prevent the sort of problems described above.

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[7] *Id.*

[8] *La Salle Railroad Crossing: Battle of a Century,* The Tribune, Feb. 19, 2008, (available *http://www.greeleytrib.com/article/20080219/NEWS/229770616*, last visited on May 28, 2008).

CONCLUSION

Amici curiae respectfully request this Court to grant the petition for writ of certiorari in order to address the important questions presented in this case.

Respectfully submitted,

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